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Constitutional Law - To Punish or Not to Punish - That Is the Question - Taylor v. Cisneros: Addressing the Constitutional Prohibitions against Civil Sanctions in the Third Circuit

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Issues in the Third Circuit

CONSTITUTIONAL LAW—TO PUNISH OR NOT TO PUNISH? THAT IS THE QUESTION. *TAYLOR V. CISNEROS*: ADDRESSING THE CONSTITUTIONAL PROHIBITIONS AGAINST CIVIL SANCTIONS IN THE THIRD CIRCUIT

I. INTRODUCTION

A punishment is "[a]ny fine, penalty, or confinement inflicted upon a person by the authority of the law and the judgment and sentence of a court, for some crime or offense committed by him."[1] The purpose of punishment is to deter future crime and to place a punitive restraint on the criminal.[2] Nevertheless, the power to punish is subject to constitutional constraints.[3] The Double Jeopardy Clause of the Fifth Amendment protects against successive or multiple punishments for the same crime.[4] The Eighth Amendment protects against cruel and unusual punishment, as well as the imposition of excessive fines.[5] The Ex Post Facto Clause protects against laws applying retroactively, thus allowing for increased punishment.[6] Finally, the United States Constitution forbids the states

1. BLACK'S LAW DICTIONARY 1234 (6th ed. 1991).

2. *See* United States v. Halper, 490 U.S. 435, 448 (1989) ("[P]unishment serves the twin aims of retribution and deterrence."); Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168 (1963) (discussing aims of punishment). Punitive is defined as "[r]elating to punishment; having the character of punishment or penalty." BLACK'S LAW DICTIONARY 1234 (6th ed. 1991).

3. *See* Department of Revenue v. Kurth Ranch, 511 U.S. 767, 778 (1994) (stating that power to inflict sanctions, whether civil or criminal, is subject to constitutional constraints). For a discussion of these specific constitutional constraints, see *infra* notes 4-8 and accompanying text.

4. *See* U.S. CONST. amend. V ("[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb."). The Supreme Court has held that "the Double Jeopardy Clause protects against three distinct abuses: a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense." *Halper*, 490 U.S. at 440; *see* Witte v. United States, 515 U.S. 339, 396 (1995) (stating that Double Jeopardy Clause protects against "'punishing twice, or attempting a second time to punish criminally, for the same offense'" (quoting Helvering v. Mitchell, 303 U.S. 391, 399 (1938))).

5. *See* U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."); *see also* Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (explaining that "the fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense").

6. *See* U.S. CONST. art. I, § 9, cl. 3 ("No Bill of Attainder or ex post facto Law shall be passed."); *see also* U.S. CONST. art. I, § 10, cl. 1 (applying same restriction to states by stating "[n]o State shall . . . pass any Bill of Attainder"). The Ex Post

from "pass[ing] a Bill of Attainder," that is, the legislature cannot inflict punishment upon an individual without a judicial trial.[7] To invoke any of these constitutional protections, the accused must first prove as a threshold matter that the action taken against him or her is punishment.[8]

Over the past several years, legislatures have increased the use of civil sanctions, forfeitures and registration provisions to penalize sex offenders as well as to combat the harsh effects of other crimes.[9] The use of civil

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Facto Clause of the Constitution prevents the government from applying laws retroactively that "inflict[ ] a greater punishment, than the law annexed to the crime, when committed." Artway v. Attorney General, 81 F.3d 1235, 1253 (3d Cir. 1996). The United States Supreme Court defined the circumstances that the Ex Post Facto Clause encompasses in *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798). First, the Ex Post Facto Clause covers "[e]very law that makes an action done before the passing of the law, and which was innocent when done, criminal." *Id.* (emphasis omitted). Second, the Ex Post Facto Clause also encompasses "[e]very law that aggravates a crime, or makes it greater than it was, when committed." *Id.* (emphasis omitted). Third, "[e]very law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed" is encompassed under the protection of the Ex Post Facto Clause. *Id.* (emphasis omitted). Fourth and finally, the Ex Post Facto Clause covers "[e]very law that alters the legal rules of evidence, and receives less, or different testimony, than the law required at the time of the commission of the offence, in order to convict the offender." *Id.* (emphasis omitted); *see* Collins v. Youngblood, 497 U.S. 37, 46 (1990) (re-establishing *Calder* categories); Beazell v. Ohio, 269 U.S. 167, 169-70 (1925) (rephrasing *Calder* categories as "any statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed").

7. *See* U.S. CONST. art. I, § 10, cl. 1 ("No State shall . . . pass any Bill of Attainder . . . ."); *see also* U.S. CONST. art. I, § 9, cl. 3 (applying this restriction to federal government as well by stating that "[n]o Bill of Attainder or ex post facto Law shall be passed"). Thus, the Constitution prohibits legislatures from enacting measures "'that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial.'" *Artway*, 81 F.3d at 1253 (quoting United States v. Brown, 381 U.S. 437, 448-49 (1965)).

8. *See generally* United States v. Ursery, 116 S. Ct. 2135, 2138 (1996) (revisiting issue of whether civil *in rem* forfeitures are considered punishment for double jeopardy purposes); *Kurth Ranch*, 511 U.S. at 769 (addressing issue of whether tax on illegal drugs constitutes punishment, and thus, violates Constitution's prohibition against double jeopardy); Austin v. United States, 509 U.S. 602, 609-10 (1993) (noting that whether civil remedy violates Excessive Fines Clause turns on whether such action is punishment); *Halper*, 490 U.S. at 441 (addressing "whether the statutory penalty authorized by the civil False Claims Act . . . constitutes a second 'punishment' for the purpose of double jeopardy analysis"); United States v. One Assortment of 89 Firearms, 465 U.S. 354, 362 (1984) (discussing whether civil *in rem* forfeiture legislation possessed punitive intent required to constitute violation of Double Jeopardy Clause); Kennedy v. Mendoza-Martinez, 372 U.S. 144, 164 (1963) (determining that issue of whether divesting American citizenship for draft evasion or military desertion violated protections of Fifth and Sixth Amendments turned on, as initial matter, whether such action is "penal in character.").

9. *See, e.g.*, Kevin Cole, *The Civil-Criminal Distinction: Civilizing Civil Forfeiture*, 7 J. CONTEMP. LEGAL ISSUES 249, 250-51 (1996) ("[The] forfeiture remedy continues to spread."); Barbara A. Mack, *Double Jeopardy—Civil Forfeitures and Criminal Punish-*

sanctions has increased partly because such proceedings do not invoke the stringent constitutional procedural protections that criminal proceedings do.[10] In *United States v. Halper*,[11] *Austin v. United States*[12] and *Department of Revenue v. Kurth Ranch*,[13] the Supreme Court changed and confused the law in the area of unconstitutional punishment.[14] In these cases, the Court carved out a few instances when certain civil sanctions rise to the level of punishment and cross over the distinction between civil and criminal penalties.[15] The Court, however, did not speak in general terms and

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ment: Who Determines What Punishments Fit the Crime, 19 SEATTLE U. L. REV. 217, 243 (1996) (explaining that government's increasing concern about organized crime and drugs led to enactment of "plethora" of laws that involved forfeiture of proceeds of crimes and property used to facilitate crime); *New White House Heartens Environmentalists*, MASS. L. WKLY., Feb. 8, 1993, at B39 (noting that forfeiture laws have been proposed as remedy for environmental crimes modeled after current drug forfeiture laws). The Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-1968 (1994), and the "Continuing Criminal Enterprise" section of the Controlled Substances Act, 21 U.S.C. § 848 (1994), began the trend toward increased civil forfeiture of criminal proceeds. *See* Mack, *supra*, at 243 (discussing how federal civil forfeiture laws began trend toward increased use of forfeiture as response to crime). In the 1980s, Congress amended the federal drug laws to authorize forfeiture of property used to facilitate drug crimes. *See* 21 U.S.C. § 881(a)(1)-(4) (1994) (providing that "[a]ll conveyances . . . which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of [controlled substances, their raw material, and equipment used in their manufacture and distribution]" are subject to forfeiture); 21 U.S.C. § 881(a)(7) (providing that "[a]ll real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used . . . to commit . . . a violation of this subchapter punishable by more than one year's imprisonment" is subject to forfeiture for violating drug offenses). For a discussion of the legislative history of § 881, see *infra* note 52. There are currently several other types of forfeiture in effect today. *See generally* U.S. DEP'T OF JUSTICE, ASSET FORFEITURE: COMPILATION OF CIVIL STATUTES (1987) (detailing forfeiture statutes currently in effect).

10. *See* LEONARD W. LEVY, A LICENSE TO STEAL: THE FORFEITURE OF PROPERTY 106 (1996) (noting that civil forfeiture proceedings invoke less constitutional protection than criminal forfeiture proceedings); David Osgood, *Crime and Punishment and Punishment: Civil Forfeiture, Double Jeopardy and the War on Drugs*, 71 WASH. L. REV. 489, 490 (1996) (discussing how civil forfeiture offers many procedural advantages over criminal forfeiture, such as lesser burden of proof and avoidance of other constitutional protections afforded to criminal defendants).

11. 490 U.S. 435 (1989).

12. 509 U.S. 602 (1993).

13. 511 U.S. 767 (1994).

14. *See id.* at 769 (addressing issue of whether tax on illegal drugs constitutes punishment that violates Constitution's prohibition against double jeopardy); *Austin*, 509 U.S. at 609-10 (stating that whether civil remedy violates Excessive Fines Clause depends on whether such action can be considered punishment); *Halper*, 490 U.S. at 448-49 (holding that civil penalty constituted punishment for double jeopardy purposes).

15. *See Halper*, 490 U.S. at 447-48 (stating that, in assessing punitive nature of fine, labeling fine "civil" or "criminal" is irrelevant). The Supreme Court explained that a civil penalty becomes punishment under the Double Jeopardy

did not carve out bright-line rules in its analysis.[16] This sporadic precedent left lower courts confused as to which civil actions trigger the constitutional restrictions on punishment.[17]

This Casebrief analyzes how the United States Court of Appeals for the Third Circuit has interpreted and applied the relevant Supreme Court precedent in the area of civil sanctions and constitutional punishment. This Casebrief also attempts to clarify the controlling analysis in the Third Circuit for determining whether a civil penalty or sanction amounts to unconstitutional punishment. Part II details the relevant Supreme Court cases that have addressed the issue of determining what is punishment for

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Clause when the civil penalty "may not fairly be characterized as remedial." *Id.* at 449.

16. *See id.* at 449 ("What we announce now is a rule for the rare case."); *see also* United States v. Ursery, 116 S. Ct. 2135, 2147 (1996) (stating that *Halper*, *Austin* and *Kurth Ranch* do not alter traditional understandings of punishment determination for double jeopardy and civil *in rem* forfeiture, but rather these cases deal with specific facts and do not have general application to punishment analysis).

17. *See* United States v. Ursery, 59 F.3d 568, 573 (6th Cir. 1995) (holding incorrectly that "under *Halper* and *Austin*, any civil forfeiture under § 21 U.S.C. § 881(a)(7) constitutes punishment for double jeopardy purposes"), *rev'd*, 116 S. Ct. 2135 (1996); United States v. $405,089.23 U.S. Currency, 33 F.3d 1210, 1221-22 (9th Cir. 1994) (concluding incorrectly that forfeiture statute constitutes punishment under *Halper* and *Austin* and that this conclusion will force government "to include a criminal forfeiture count in the indictment (and thus forego the favorable burdens it would face in the civil forfeiture proceeding) or to pursue only the civil forfeiture action (and thus forego the opportunity to prosecute the claimants criminally)"), *rev'd*, 116 S. Ct. 2135 (1996). Exemplifying the confusion that Supreme Court precedent had caused in the punishment analysis, prior to the Supreme Court's decision in *Ursery*, the United States Courts of Appeals for the Sixth and Ninth Circuits held that Supreme Court precedent required a finding that civil *in rem* forfeiture constituted punishment and, thus, invoked constitutional restrictions on punishment. *See Ursery*, 59 F.3d at 573 (finding that, under *Halper* and *Austin*, any civil forfeiture constitutes punishment for double jeopardy purposes); *$405,089.23 U.S. Currency*, 33 F.3d at 1221-22 (concluding that forfeiture statute constitutes punishment under *Halper* and *Austin*). Other circuits disagreed with the Sixth Circuit in *Ursery* and the Ninth Circuit in *$405,089.23 U.S. Currency* and concluded that *Halper* and *Austin* did not control in deciding whether civil *in rem* forfeiture was punitive. *See* Smith v. United States, 76 F.3d 879, 882-83 (7th Cir. 1996) (disagreeing with Sixth and Ninth Circuits because there is "nothing in *Austin* which precludes the conclusion that a defendant has no claim to the proceeds of drug trafficking and that those proceeds are by definition directly proportional to the loss to the government and society"); United States v. $184,505.01 in U.S. Currency, 72 F.3d 1160, 1169 n.15 (3d Cir. 1995) (rejecting conclusions of Sixth and Ninth Circuits and finding that Supreme Court precedent did not control determining civil *in rem* forfeiture as punishment), *cert. denied*, 117 S. Ct. 48 (1996); United States v. Clementi, 70 F.3d 997, 999 (8th Cir. 1995) (rejecting Ninth Circuit's "categorical approach to double jeopardy analysis"); United States v. Salinas, 65 F.3d 551, 553 (6th Cir. 1995) (distinguishing "civil forfeitures of property proportionately related to the offense from forfeitures of conveyances and real property, which, because of the dramatic variations in their value, bear no relation to the underlying offense"); United States v. Tilley, 18 F.3d 295, 298-300 (5th Cir. 1994) (distinguishing *Halper* and *Austin* as controlling precedent in cases addressing punitive nature of civil *in rem* forfeiture).

the purpose of invoking constitutional protections.[18] Part II also discusses *United States v. Ursery*,[19] the most recent Supreme Court case in this area.[20] Part III discusses how the Third Circuit has interpreted and synthesized the Court's relevant precedent into a three-part test for determining which civil actions constitute punishment.[21] Part III also focuses on the Third Circuit's application of that test in light of *Ursery*.[22] Ultimately, this Casebrief outlines the appropriate analysis in the Third Circuit for addressing the constitutionality of civil sanctions and comments on whether the Third Circuit made an appropriate and sound assimilation of the Supreme Court case law in formulating a test for assessing what amounts to unconstitutional punishment.[23]

II. BACKGROUND

As the Supreme Court has noted, "[c]riminal fines, civil penalties, civil forfeitures, and taxes all share certain features: They generate government revenues, impose fiscal burdens on individuals, and deter certain behavior. All of these sanctions are subject to constitutional constraints."[24] The Supreme Court has held that the government or the victim may seek civil relief with respect to the same act or omission that is considered criminal.[25] Civil sanctions purport to serve a remedial purpose for victims of crime.[26] The government and the individual victim of

18. For a discussion of the relevant Supreme Court cases in determining which civil actions are punishment invoking constitutional restrictions, see *infra* notes 37-62 and accompanying text.

19. 116 S. Ct. 2135 (1996).

20. For a discussion of *Ursery*, see *infra* notes 75-94 and accompanying text.

21. For a discussion of how the Third Circuit has interpreted Supreme Court precedent for determining which civil actions constitute punishment, see *infra* notes 95-122 and accompanying text.

22. For a discussion of the Third Circuit's development of a three-part test to determine which civil actions constitute punishment, see *infra* notes 123-74 and accompanying text.

23. For a discussion of the current analysis used in the Third Circuit for determining whether a civil sanction constitutes punishment, see *infra* notes 175-88 and accompanying text.

24. Department of Revenue v. Kurth Ranch, 511 U.S. 767, 778 (1994) (noting that civil sanctions, like criminal sanctions, are subject to constitutional restrictions).

25. *See* Helvering v. Mitchell, 303 U.S. 391, 399 (1938) (holding that government may impose criminal and civil sanctions for same act or omission, however, determination of whether civil sanction is punishment is question of statutory construction).

26. *See, e.g.*, United States v. Halper, 490 U.S. 435, 446 (1989) (stating that government is entitled to remedial justice through compensation by criminals); Mack, *supra* note 9, at 244 (arguing that forfeiture laws were "designed to target those at the top of the drug distribution ladder—those who live off the profits illegally derived from the addictions and misfortunes of others . . . [and] forfeiture laws were, and remain, a valuable tool for fighting organized crime, major drug activity, and other crimes motivated by greed"). The "civil remedy" is "the remedy afforded by law to a private person in the civil courts in so far as his private and

a crime may use this route as a remedial measure for the loss that crime causes.[27]

The Supreme Court, however, has not readily upheld all types of civil measures. In *De Veau v. Braisted*,[28] the Court recognized that determining the punitive nature of certain civil sanctions requires an inquiry into the actual legislative purpose of the measure.[29] In *De Veau*, the Court addressed an ex post facto and bill of attainder challenge to a New York statute that barred labor organizations whose officers were convicted felons from collecting dues.[30] The Court held that, in analyzing cases in which an individual suffers unpleasant consequences for prior conduct, a court should look to the legislative purpose of the measure imposing such consequences.[31] The Court explained that the legislative intent or subjec-

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individual rights have been injured by a delict or crime; as distinguished from the remedy by criminal prosecution for the injury to the rights of the public." BLACK'S LAW DICTIONARY 1294 (6th ed. 1991). The civil remedy is "afforded by law to a private person in the civil courts in so far as his [or her] private and individual rights have been injured by a delict of a crime." *Id. But see* Cole, *supra* note 9, at 250 (suggesting that civil forfeiture is "mere anarchism" and cannot be justified in contemporary society).

27. *See, e.g.*, 21 U.S.C. § 881(a)(4), (7) (1994) (requiring forfeiture of property based upon illegal drug possession); N.J. STAT. ANN. § 2A:18-61.1n (West 1996 & Supp. 1997) (allowing for removal of tenant for use of illegal drugs on apartment complex premises). Statutory forfeiture is a very common type of civil remedy. *See* Austin v. United States, 509 U.S. 602, 613-18 (1993) (detailing history and prevalence of forfeiture in United States as civil remedy); LEVY, *supra* note 10, at 1-43 (detailing history of civil forfeiture and discussing popular use of forfeiture in response to illegal drug activity).

Recently, sexual predator registration and notification laws have created new questions about the constitutionality of civil sanctions. *See* Daniel Armagh, *Registration and Community Notification Laws*, PROSECUTOR, May-June 1996, at 10 (detailing mechanics of sexual predator registration and notification laws in various states); *see also* Lori N. Sabin, Note, Doe v. Poritz*: A Constitutional Yield to an Angry Society*, 32 CAL. W. L. REV. 331, 351-56 (1996) (detailing constitutionality of New Jersey's sexual predator registration and notification law named "Megan's Law"). Numerous state and federal courts have addressed the constitutionality of sexual predator registration and notification laws. *See* State v. Myers, 923 P.2d 1024, 1044 (Kan. 1996) (noting that many courts have addressed this issue and finding that registration provisions are constitutional but notification provisions violate Ex Post Facto Clause of Constitution), *cert. denied*, 117 S. Ct. 2508 (1997). For a list of state community registration laws, see *infra* note 102.

28. 363 U.S. 144 (1960).

29. *See id.* at 160 (emphasizing importance of actual legislative purpose in assessing punitive nature of statute).

30. *See id.* at 145 (describing action brought by officer of International Longshoremen's Association). The act in question was the New York Waterfront Commission Act of 1953, N.Y. PUB. AUTH. LAW § 6700aa (McKinney 1996). *See DeVeau*, 363 U.S. at 144-45 (discussing effect of New York Waterfront Commission Act on appellant's eligibility to hold office).

31. *See DeVeau*, 363 U.S. at 160 (stating that judicial inquiry should focus on "whether the legislative aim was to punish that individual for past activity, or whether the restriction of the individual comes about as a relevant incident to a regulation of a present situation").

tive purpose of a civil penalty is relevant in assessing whether it constitutes punishment.[32]

Generally, the Supreme Court has held that civil *in rem* forfeiture does not constitute punishment for purposes of the Double Jeopardy Clause.[33] The Court has found that civil *in rem* forfeiture has a remedial rather than punitive purpose.[34] In recent years, the Supreme Court has addressed whether other civil sanctions violate constitutional limitations on punish-

32. *See id.* The Court upheld the statute on these constitutional grounds. *See id.* The Court explained "that New York sought not to punish ex-felons, but to devise what was felt to be a much-needed scheme of regulation of the waterfront, and for the effectuation of that scheme it became important whether individuals had previously been convicted of a felony." *Id.*

33. *See* United States v. Ursery, 116 S. Ct. 2135, 2147-48 (1996) (concluding that intent and effect of civil *in rem* forfeiture statutes was not to impose punishment); United States v. One Assortment of 89 Firearms, 465 U.S. 354, 366 (1984) (holding that civil *in rem* forfeiture proceeding after acquittal of criminal activity does not violate Double Jeopardy Clause); Various Items of Personal Property v. United States, 282 U.S. 577, 581 (1931) (holding that Double Jeopardy Clause is not applicable to forfeiture because forfeiture is not criminal offense).

34. *See 89 Firearms*, 465 U.S. at 362 (explaining that relevant inquiry in assessing punitive nature of forfeiture is "whether . . . [the] proceeding is intended to be, or by its nature necessarily is, criminal and punitive, or civil and remedial" and concluding under this analysis that forfeiture is remedial). The Court in *89 Firearms* pointed out that "[r]esolution of this question begins as a matter of statutory interpretation." *Id.* First, the court must determine whether Congress "in establishing the penalizing mechanism, indicated either expressly or impliedly a preference" for punitive or remedial purposes. *Id.* Second, if the intention of Congress was to establish a civil penalty, then the court must probe further to ascertain "whether the statutory scheme was so punitive either in purpose or effect as to negate that intention." *Id.* at 362-63. The Court explained that a conclusion that such a measure is punitive should be evidenced by the "'clearest proof' that Congress has provided a sanction so punitive as to 'transfor[m] what was clearly intended as a civil remedy into a criminal penalty.'" *Id.* at 366 (quoting Rex Trailer Co. v. United States, 350 U.S. 148, 154 (1956)); *see Ursery*, 116 S. Ct. at 2147-48 (invoking analysis used in *89 Firearms* to assess constitutionality of civil *in rem* forfeiture); One Lot Emerald Cut Stones v. United States, 409 U.S. 232, 236-37 (1972) (explaining generally that Congress did not intend for civil *in rem* forfeiture to be criminal punishment). For a discussion of *Ursery*, see *infra* notes 75-94 and accompanying text.

ment.[35] In these cases, the Court has made the constitutionality of civil proceedings less clear.[36]

A. Halper, Austin *and* Kurth Ranch*: The Punishment Trilogy*

Although civil remedies legitimately exist as remedial measures for the government, such penalties may not drastically exceed the actual loss suffered as a result of the crimes.[37] In *United States v. Halper*, the Court recognized for the first time that a civil sanction, as well as a criminal sanction, can amount to unconstitutional punishment.[38] In *Halper*, the Government indicted the defendant for sixty-five counts of Medicare fraud.[39] The Government then sought civil remedial damages, under the False Claims Act,[40] from Halper.[41] Under this action, the Government was entitled to receive $130,000 in fines from Halper, although the actual damages for his fraudulent Medicare claims amounted to only $585.[42] In

35. *See* Department of Revenue v. Kurth Ranch, 511 U.S. 767, 784 (1994) (holding that Montana drug tax violated Double Jeopardy Clause because purpose of penalty was not remedial); Austin v. United States, 509 U.S. 602, 621-22 (1993) (holding that, "[i]n light of the historical understanding of forfeiture as punishment, the clear focus of § 881(a)(4) and (a)(7) on the culpability of the owner, and the evidence that Congress understood those provisions as serving to deter and to punish," forfeiture under 21 U.S.C. § 881 is not remedial and violated Excessive Fines Clause); United States v. Halper, 490 U.S. 435, 448 (1989) (explaining "that a civil sanction that cannot fairly be said solely to serve a remedial purpose but rather can only be explained as also serving either retributive or deterrent purposes, is punishment").

36. *See* United States v. Stoller, 78 F.3d 710, 713 (1st Cir. 1996) (explaining that evaluation of civil sanctions under "the Double Jeopardy Clause [is] dimly lit by" *Halper*, *Austin* and *Kurth Ranch*), *cert. dismissed*, 117 S. Ct. 378 (1996).

37. *See Halper*, 490 U.S. at 449-50 (concluding that Government is entitled to remedial justice, but that remedy must be in proportion to loss sustained).

38. *See Halper*, 490 U.S. at 448 ("[P]unishment . . . cuts across the division between the civil and the criminal law.").

39. *Id.* at 437. Halper was a manager of New City Medical Laboratories, Inc., a company that provided medical services for patients eligible for Medicare benefits. *See id.* The Government alleged that between 1982 and 1983 Halper demanded reimbursement for several claims at $12 per claim when the actual service rendered entitled New City to only $3 per claim. *See id.* at 435. Specifically, this was a violation of 18 U.S.C. § 287, which prohibits "mak[ing] or presen[ting] . . . any claim upon the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent." *Halper*, 490 U.S. at 435 (citing 18 U.S.C. § 287 (1994)). A jury convicted Halper on all counts. *See id.* He was sentenced to two years in prison and fined $5000. *See id.*

40. 31 U.S.C. §§ 3729-3731 (1994). Specifically, the False Claims Act imposes liability on any person who uses false records to get the Government to pay a false claim. *See id.* § 3729 (stating that person is liable who "knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved").

41. *See Halper*, 490 U.S. at 438.

42. *See id.* at 439. The remedial provisions of the False Claims Act provided that a person "is liable to the United States Government for a civil penalty of $2,000, an amount equal to 2 times the amount of damages the Government sustains because of the act of that person and costs of the civil action." *Id.* at 438

finding that this civil penalty violated the Double Jeopardy Clause, the Court held that a nominal "civil" penalty constitutes punishment if its actual purpose serves the punitive goals of retribution and deterrence.[43] The Court explained that when a civil penalty "is so extreme and so divorced from the Government's damages and expenses," it constitutes punishment.[44] The *Halper* Court recognized that rare cases may arise when civil penalties cross the line between remedial and punitive and violate the Constitution's protection against double jeopardy.[45]

The historical understanding of a civil penalty is also a significant factor in assessing its punitive nature under the Constitution.[46] In *Austin v. United States*, the Court held that forfeiture under 21 U.S.C. § 881(a)(4) and (a)(7), which allow for forfeiture of drug proceeds, amounted to punishment under the Excessive Fines Clause.[47] In *Austin*, the defendant was indicted on four counts of violating the drug laws in South Dakota.[48] After the defendant pleaded guilty to one count and received his sentence, the United States initiated *in rem* proceedings against the defendant's property pursuant to § 881(a)(4) and (a)(7).[49] The Court addressed the

(citing 31 U.S.C. § 3729). Because Halper violated the False Claims Act 65 times, under § 3729, he was subject to a $130,000 penalty. *See id.*

43. *See id.* at 448. The Court noted that "[i]n drafting his initial version of what came to be our Double Jeopardy Clause, James Madison focused explicitly on the issue of multiple punishment: 'No person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offence.'" *Id.* at 440 (quoting 1 ANNALS OF CONG. 434 (Joseph Gales ed., 1789)).

44. *Id.* at 442. The Court explained that civil penalties lose their remedial character when the fines imposed far exceed the damage that the Government suffered. *See id.* at 448. The Court made it clear, however, that civil remedies are not a per se violation of the Constitution if they allow for recovery "in excess of the Government's actual damages." *Id.* at 442. Nevertheless, under the civil False Claims Act, Halper was subject to "liability of $130,000 for false claims amounting to $585." *Id.* at 441.

45. *Id.* The Court held that subsequent civil sanctions that "may not fairly be characterized as remedial, but only as a deterrent or retribution may amount to punishment . . . [and] rise to the level of a violation of Double Jeopardy." *See id.* at 448-49. The Court held that the Double Jeopardy Clause prohibits subjecting a defendant to a subsequent civil sanction that cannot fairly be characterized as remedial. *See id.* In a particular case, if a civil or criminal fine "serves the goals of punishment . . . [and] the twin aims of retribution and deterrence," it is punishment. *Id.* at 448. Thus, the Court put forth a proportionality balancing test for assessing the punitive nature of some civil sanctions. *See id.* at 449-50; *see also* Artway v. Attorney General, 81 F.3d 1235, 1254 (3d Cir. 1996) (describing rule in *Halper* as "[o]bjective [p]urpose through [p]roportionality"). In essence, the rule the Court carved out in *Halper* is one "for the rare case." *Halper*, 490 U.S. at 449.

46. *See* Austin v. United States, 509 U.S. 602, 610-11 (1993) (holding that historical understanding of forfeiture is relevant in assessing whether such penalty is punishment).

47. *Id.* at 622. For the language of § 881, see *supra* note 9.

48. *Austin*, 509 U.S. at 604 (noting that defendant pleaded guilty to one count of possessing cocaine with intent to distribute and was sentenced to seven years imprisonment).

49. *See id.* at 604-05. Austin's auto body shop and his mobile home were forfeited. *See id.*

sole question of whether this civil action violated the Eighth Amendment's Excessive Fines Clause.[50] In concluding that there was a constitutional violation, the Court held that resolution of this issue turned on "whether, at the time the Eighth Amendment was ratified, forfeiture was understood at least in part as punishment and whether forfeiture . . . should be so understood today."[51] The Court held that traditional historical understandings of forfeiture led to the conclusion that the forfeiture in this case constituted punishment under the Excessive Fines Clause.[52] The Court's

50. *See id.* at 606. The last time the Court had addressed this issue was in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989). *See Austin*, 509 U.S. at 606. In *Browning-Ferris*, the Court held that the Excessive Fines Clause "does not limit the award of punitive damages to a private party in a civil suit when the government neither has prosecuted the action nor has any right to receive a share of the damages." *Id.* (citing *Browning-Ferris*, 492 U.S. at 264). The Court also concluded in *Browning-Ferris* that both the Eighth Amendment and section 10 of the English Bill of Rights of 1689, from which the Eighth Amendment is derived, were intended to prevent the government from abusing its power to punish. *Browning-Ferris*, 492 U.S. at 266-67. *Austin* overruled *Browning-Ferris*, in part, by holding that the Excessive Fines Clause does not prevent civil fines unless "that proceeding is so punitive that it must be considered criminal under *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), and *United States v. Ward*, 448 U.S. 242 (1980)." *Austin*, 509 U.S. at 607-08. In *Austin*, the Court clarified that the focus is not on whether the statute is criminal, but whether it is punishment. *Id.* at 610. For a discussion of *Mendoza-Martinez*, see *infra* note 108 and accompanying text.

51. *Austin*, 509 U.S. at 610-11. The Court looked at what types of forfeiture existed in England at the time the United States ratified the Eighth Amendment: the deodand, felony forfeiture and statutory forfeiture. *See id.* at 611. The Court stated:

> At common law the value of an inanimate object . . . causing the accidental death of a King's subject was forfeited to the Crown as a deodand . . . . When application of the deodand to religious or eleemosynary purposes ceased, and the deodand became a source of Crown revenue, the institution was justified as a penalty for carelessness.

Id. Felony forfeiture resulted when "'[t]he convicted felon forfeited his chattels to the Crown and his lands escheated to his lord; the convicted traitor forfeited all of his property, real and personal, to the Crown.'" *Id.* at 611-12 (quoting Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 680-81 (1974)). Finally, the Court noted that "'English Law provided for statutory forfeitures of offending objects used in violation of the customs and revenue laws.'" *Id.* at 612 (quoting *Calero-Toledo*, 416 U.S. at 682). The Court noted that the deodand, felony forfeiture and statutory forfeiture all have elements of punishment, however, only statutory forfeiture was adopted in the United States. *See id.* at 613.

52. *See id.* at 622. In analyzing § 881 under this historical framework, the Court noted that "forfeiture has been justified on two theories—that the property itself is 'guilty' of the offense, and that the owner may be held accountable for the wrongs of others to whom he entrusts his property." *Id.* at 615. In the Court's opinion, the rationale for forfeiture rests on punishing the negligence of the owners. *See id.* The Court concluded that, regardless of the fact that the First Congress did not consider forfeiture "to be beyond the purview of the Eighth Amendment," they did consider it to be punishment. *Id.* at 613. The Court also pointed out that the legislative history of § 881 confirms that it is punitive. *See id.* at 620. When Congress added subsection (a)(7) to § 881 in 1984, it "recognized 'that the traditional criminal sanctions of fine and imprisonment are inadequate to deter or punish the enormously profitable trade in dangerous drugs.'" *Id.* at 620 (quoting S. REP. NO. 98-225, at 191 (1983)). The Court noted that Congress "characterized

holding in *Austin* clarifies that the traditional historical understanding of the statutory civil penalty is another factor to consider in assessing the punitive nature of a statute that inflicts a civil sanction.[53]

The Supreme Court has also stated that, in assessing the punitive nature of civil sanctions, the reviewing court should look to the true salutary nature of the measure.[54] In *Department of Revenue v. Kurth Ranch*, the Court held that Montana's Dangerous Drug Tax Act[55] imposed a criminal penalty and violated the Double Jeopardy Clause.[56] In *Kurth Ranch* the respondents were convicted of possession of marijuana.[57] In addition to the criminal charges against the respondents, the Department of Revenue also instituted a proceeding pursuant to the Dangerous Drug Tax Act.[58] In addressing whether the particular tax violated the Double Jeopardy Clause, the Court looked at whether it operated in a manner typical of

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the forfeiture of real property as 'a powerful deterrent.'" *Id.* (quoting S. REP. NO. 98-225, at 195); *see also* 124 CONG. REC. 34670-71 (1978) (noting penal nature of forfeiture statutes). Finally, the Court held that "[i]n light of the historical understanding of forfeiture as punishment, the clear focus of §§ 881 (a)(4) and (a)(7) on the culpability of the owner, and the evidence that Congress understood those provisions as serving to deter and to punish," the Court could not "conclude that forfeiture under § 881 . . . serves solely a remedial purpose." *Austin*, 509 U.S. at 621-22.

53. *Austin*, 509 U.S. at 620 (focusing on historical purpose of measure in determining its punitive nature). Under *Austin*, a measure that historically serves a punitive purpose is punishment unless the text or the legislative history indicates a purpose to the contrary. *See* Artway v. Attorney General, 81 F.3d 1235, 1257 (3d Cir. 1996) (interpreting *Austin* to mean that historical understanding of sanction together with statutory language and legislative history determine whether it is punitive for Eighth Amendment purposes).

54. *See* Department of Revenue v. Kurth Ranch, 511 U.S. 767, 781-82 (1994) (emphasizing importance of salutary purpose of statutory sanction in assessing its punitive nature). "Salutary" is an objective term used to describe things that are "health-giving" or "beneficial." MERRIAM WEBSTER DICTIONARY 461 (10th ed. 1995).

55. MONT. CODE ANN. §§ 15-25-101 to -111 (1995) (imposing tax on possession and storage of dangerous drugs to be collected only after payment of state and federal funds).

56. *Kurth Ranch*, 511 U.S. at 784. The Dangerous Drug Tax Act provided for a tax "on the possession and storage of dangerous drugs." MONT. CODE ANN. § 15-25-111(1). The Montana statute expressly provided that the tax "is to be collected only after any state or federal fines or forfeitures have been satisfied." *Id.* § 15-25-111(3). The Act further defined a "dangerous drug" as that term is defined in the Montana Code provisions concerning such drugs. *See id.* § 15-25-103(2).

57. *Kurth Ranch*, 511 U.S. at 772. The respondents in *Kurth Ranch* operated a mixed grain and livestock farm in Montana. *See id.* at 771. They also used the farm for cultivating and selling marijuana. *See id.* Two weeks after the drug tax came into effect, law enforcement agencies raided the farm. *See id.*

58. *See id.* at 773. The State filed criminal charges, and the respondents eventually accepted a plea agreement. *See id.* at 772. Then, the county attorney filed forfeiture proceedings. *See id.* This forfeiture action sought recovery of the cash and equipment used in the marijuana operation. *See id.* The actual drugs were not forfeited in this action because they were destroyed presumably after the arrest. *See id.* The respondents settled the forfeiture action by agreeing to forfeit a cash amount and various equipment. *See id.*

taxes, that is, whether it served revenue-raising, rather than punitive purposes.[59] In concluding that the Montana drug tax refuted that nonpunitive presumption, the Court emphasized that the imposition of this tax was conditioned on the commission of a crime and that the tax was levied after the commencement of a criminal proceeding against the taxpayer for the same conduct that triggered liability under Montana's Dangerous Drug Tax Act.[60] Accordingly, the Court concluded that curative and remedial justifications "vanish when the taxed activity is completely forbidden."[61] In light of *Kurth Ranch*, a reviewing court should emphasize the legitimacy of the purported beneficial purpose of a civil sanction when evaluating whether it is punitive.[62]

B. *Switching the Focus to the Effects of the Civil Sanction*

In 1995, the Court added yet another factor in determining the punitive nature of a statutory sanction. In *California Department of Corrections v. Morales*,[63] the Court shifted the focus of the analysis from a law's purpose to its effect.[64] Jose Morales had been twice convicted of murder in Califor-

59. *See id.* at 779-80. *Kurth Ranch* also addressed the relevance of *Halper*. *Id.* at 776-78. The Court pointed out that even though in *Halper* "we considered 'whether and under what circumstances a civil penalty may constitute punishment for the purposes of double jeopardy analysis,'" *Halper* does not control. *Id.* at 776 (quoting United States v. Halper, 490 U.S. 435, 436 (1989)). The Court concluded that *Halper* does not answer the question of whether a tax may "similarly be characterized as punitive." *Id.* at 778. For a list of cases that also limited *Halper*'s applicability to fixed penalty statutes, see *infra* note 83.

60. *See Kurth Ranch*, 511 U.S. at 781. The fact that the imposition of the tax occurs only after the commission of a crime is "'significant of penal and prohibitory intent rather than the gathering of revenue.'" *Id.* (quoting United States v. Constantine, 296 U.S. 287, 295 (1935)).

61. *Id.* at 782. The Court also noted: "Taken as a whole, this drug tax is a concoction of anomalies, too far-removed in crucial respects from a standard tax assessment to escape characterization as punishment for the purpose of double jeopardy analysis." *Id.* at 783; *see* Artway v. Attorney General, 81 F.3d 1235, 1259 (3d Cir. 1996) ("[*Kurth Ranch*] differentiated among taxes with a pure revenue raising purpose, mixed-motive taxes imposed both to deter a disfavored activity and to raise revenue, and taxes imposed upon illegal activities.").

62. *Kurth Ranch*, 511 U.S. at 781-83 (emphasizing that court should look to true salutary purpose of statute); *see also Artway*, 81 F.3d at 1259 (stating that under *Kurth Ranch* "courts must examine whether the particular measure at issue operates in a 'usual' manner consistent with its historically salutary or mixed purposes"). In this regard, the Third Circuit disagreed with the United States Court of Appeals for the First Circuit's interpretation of *Kurth Ranch* in *United States v. Stoller*, 78 F.3d 710 (1st Cir. 1996), *cert. dismissed*, 117 S. Ct. 378 (1996). *See Artway*, 81 F.3d at 1259 n.24. *Stoller* argues that *Kurth Ranch* creates a general rule "dub[bed] the 'totality of the circumstances' test—while *Halper* is an 'exception' for 'monetary' penalties." *Id.* The Third Circuit clarified its disagreement with this position by stating that it is "loath to read [*Halper*] so narrowly without instruction from the Supreme Court . . . [because the court] read nothing in *Kurth Ranch* indicating that it supplies the general rule and *Halper* provides the exception." *Id.*

63. 514 U.S. 499 (1995).

64. *Id.* at 513 (determining that law's purpose had little effect because it did not actually extend period of confinement); *see also Artway*, 81 F.3d at 1260 (noting

nia.[65] Under the law in effect at the time of his second conviction, Morales would have been entitled to receive parole suitability hearings annually.[66] One year after his conviction, however, the California Legislature authorized the Parole Board to defer suitability hearings for three years for those prisoners convicted of "more than one offense which involves the taking of a life."[67] This left Morales ineligible for parole for a longer time period than originally anticipated.[68] He appealed this result, claiming a violation of the Ex Post Facto Clause of the Constitution.[69]

The Court rejected the assertion that this action violated the Ex Post Facto Clause.[70] In reaching this conclusion, the Court addressed whether the amended statute increased Morales's punishment.[71] The Court rejected this argument because denying the number of parole suitability hearings that Morales originally anticipated did not have a punitive effect.[72] The Court's discussion in *Morales* of determining punishment in terms of the effects of a particular measure is applicable in generally assessing the punitive nature of civil sanctions.[73] Consequently, *Morales* provides that another factor—the sanction's effect—is relevant in an overall determination of whether a civil sanction is punitive.[74]

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that Court in *Morales* shifted focus on determination of punishment from law's purpose to its effect).

65. *See Morales*, 514 U.S. at 502.

66. *See id.* at 503.

67. *Id.* (citing CAL. PENAL CODE ANN. § 3041.5(b)(2) (West 1982)).

68. *See id.* (noting that Morales's next scheduled parole hearing was to be two years later than anticipated).

69. *See id.* at 504 (noting Morales filed federal habeas corpus petition asserting that he was being held in violation of his constitutional rights). For discussion of the Ex Post Facto Clause, see *supra* notes 6-7 and accompanying text.

70. *See Morales*, 514 U.S. at 504 (reversing Ninth Circuit finding of Ex Post Facto Clause violation).

71. *See id.* at 505 (noting legislation in question effected no change in definition of Morales's crime). The Supreme Court has held that the Ex Post Facto Clause is aimed at laws that "retroactively alter the definition of crimes or increase the punishment for criminal acts." Collins v. Youngblood, 497 U.S. 37, 43 (1990).

72. *See Morales*, 514 U.S. at 513 (finding postponement of prisoner's suitability hearing did not extend actual period of confinement). The Court stated that the "California legislation at issue creates only the most speculative and attenuated risk of increasing the measure of punishment." *Id.* at 514.

73. *See* Artway v. Attorney General, 81 F.3d 1235, 1260 (3d Cir. 1996) ("*Morales* makes clear that a law can be unconstitutional because of its punitive effect.")

74. *See id.* at 1261 (reading *Morales* to confirm that "'punishment' analysis depends on the context").

C. United States v. Ursery: *The Supreme Court Explains "Where All the Pieces Fit"*

The broad language and narrow holdings in *Halper, Austin* and *Kurth Ranch* caused some confusion in the lower courts.[75] The United States Courts of Appeals for the Sixth and Ninth Circuits read these cases to mean that the Supreme Court "changed . . . [its] collective mind" and "adopted a new test for determining whether a nominally civil sanction constitutes 'punishment' for double jeopardy purposes."[76] In *United States v. Ursery*, the Court clarified that it has consistently held that civil *in rem* forfeitures do not constitute punishment and, thus, do not violate the Constitutional prohibition against double jeopardy.[77]

In *Ursery*, the defendants asserted that the Double Jeopardy Clause barred the criminal proceedings against them because a primary forfeiture action amounted to punishment.[78] In agreeing with the defendants, the lower courts construed *Austin* and *Halper* very broadly to mean that

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75. *See* Mack, *supra* note 9, at 252 (arguing that Supreme Court precedent in this area involves "tortured analysis" that opens door for lower courts to extend double jeopardy protection too far). For a discussion of cases that extended the legal conclusions in *Halper, Austin* and *Kurth Ranch* too far, see *infra* notes 76-88 and accompanying text. For a list of other circuit court cases that disagreed with the expansive treatment the Sixth and Ninth Circuits gave to *Halper, Austin* and *Kurth Ranch*, see *supra* note 17.

76. United States v. Ursery, 116 S. Ct. 2135, 2143 (1996); *see* United States v. Ursery, 59 F.3d 568, 573 (6th Cir. 1995), *rev'd*, 116 S. Ct. 2135 (1996); United States v. $405,089.23 U.S. Currency, 33 F.3d 1210, 1218-19 (9th Cir. 1994), *rev'd*, 116 S. Ct. 2135 (1996).

77. *Id.* at 2140 (noting Double Jeopardy Clause does not apply to civil forfeitures). In *Ursery*, the Court reaffirmed a rule that has its roots "in a long line of" Supreme Court cases. *See id.*; *see also* United States v. Ward, 448 U.S. 242, 248-49 (1980) (explaining that determination of whether civil *in rem* forfeiture constitutes double jeopardy turns on intent of legislature and effects of law); One Lot Emerald Cut Stones v. United States, 409 U.S. 232, 235 (1972) (rejecting owner's double jeopardy objection to civil *in rem* forfeiture because it was not criminal proceeding); Various Items of Personal Property v. United States, 282 U.S. 577, 581 (1931) (holding that prohibition against double jeopardy is not applicable to forfeiture because it is not criminal offense).

78. *Ursery*, 116 S. Ct. at 2139 (noting holdings of lower courts). In *Ursery*, the Government initiated forfeiture proceedings against the defendant after finding him in possession of drugs. *Id.* at 2138-39. The police discovered marijuana growing adjacent to the defendant's house as well as marijuana seeds, stems, stalks and a grow light in the house. *See id.* The Government instituted forfeiture proceedings against Ursery's house pursuant to 21 U.S.C. § 881(a)(7) because the property had been used "to facilitate the unlawful processing and distribution of a controlled substance." *Ursery*, 116 S. Ct. at 2139. Subsequently, the Government sought a criminal conviction against the defendant for the same conduct. *See id.* (noting Ursery was indicted for manufacturing marijuana). Ursery settled the forfeiture claim with the Government for $13,250. *See id.* Before this settlement, the Government also indicted Ursery for manufacturing marijuana in violation of 21 U.S.C. § 841(a)(1). *See Ursery*, 116 S. Ct. at 2139. A jury found him guilty and sentenced him to 63 months in prison. *See id.* In a companion case, before the defendants were tried on charges of conspiracy to aid and abet the manufacturer of methamphetamine and various counts of money laundering, the United States

civil forfeiture constituted a separate criminal proceeding and violated the Double Jeopardy Clause.[79] In *Ursery*, the Supreme Court rejected this interpretation of its precedent.[80] The Court explained the precedential significance of *Halper*, *Austin* and *Kurth Ranch* in assessing the constitutionality of civil sanctions.[81] The Court reiterated that *Halper* considered the constitutionality of a civil penalty, not a civil forfeiture, and stressed that the case had a narrow focus.[82] In *Halper*, the Court advised that when assessing whether a penalty provision constitutes punishment, the court should weigh and balance the harm suffered and the penalty imposed on a case-by-case basis.[83] Under this analysis, *Ursery* clarified that

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instituted a civil *in rem* forfeiture action against various items of property owned by the defendants. *See id.*

79. *See Ursery*, 116 S. Ct. at 2140. The lower courts in *Ursery* read the language in *Halper* and *Austin* very broadly and concluded that those cases created a general presumption that forfeiture is a punitive measure for both double jeopardy and excessive fines purposes. *See id.* Thus, the Sixth Circuit reversed the conviction based on its interpretation of *Halper* and *Austin*. *See id.* at 2139. The circuit court interpreted these cases to mean that any civil forfeiture under § 887(a)(7) constituted punishment for purposes of the Double Jeopardy Clause. *See id.* (noting Sixth Circuit's view that Ursery had been "punished"). As such, the court vacated Ursery's subsequent conviction because under its determination the conviction violated the prohibition against double jeopardy. *See id.*

80. *Id.* at 2149 (noting that civil forfeiture does not constitute punishment for purpose of Double Jeopardy Clause).

81. *See id.* at 2143-47.

82. *See id.* at 2144 (noting that decision in *Halper* was "limited to the context of civil penalties"). The Court elaborated that "[i]t is difficult to see how the rule of *Halper* could be applied to a civil forfeiture. Civil penalties are designed as a rough form of 'liquidated damages' for the harms suffered by the Government as a result of a defendant's conduct." *Id.* at 2145; *see also* Rex Trailer Co. v. United States, 350 U.S. 148, 151 (1956) (upholding civil sanction following criminal conviction because liquidated damages are allowable when damages are difficult to determine and, when reasonable, such damages are not punitive).

83. United States v. Halper, 490 U.S. 435, 448 (1989) ("[T]he determination whether a given civil sanction constitutes punishment . . . requires a particularized assessment of the penalty imposed and the purposes that penalty may fairly be said to serve.") *But see Ursery*, 116 S. Ct. at 2145 (noting case-by-case balancing analysis is inappropriate for civil forfeiture). The Court in *Ursery* noted: "Whether a 'fixed-penalty provision' that seeks to compensate the Government for harm it has suffered is 'so extreme' and 'so divorced' from the penalty's nonpunitive purpose of compensating the Government as to be a punishment may be determined by balancing the Government's harm against the size of the penalty." *Id.* (quoting *Halper*, 490 U.S. at 441). Justice Kennedy's concurring opinion in *Halper* urged that an analysis under the majority opinion is fact sensitive and dependent on the particular nuances of the statutory measure. *Halper*, 490 U.S. at 453 (Kennedy, J., concurring) (determining that majority ruling "constitutes an objective rule that is grounded in the nature of the sanction and the facts of the particular case"). Justice Kennedy explained that this kind of analysis for the lower courts "would be amorphous and speculative, and would mire the courts in the quagmire of differentiating among the multiple purposes that underlie every proceeding." *Id.* (Kennedy, J., concurring). Many courts have refused to extend *Halper* beyond the limited context of a monetary penalty. *See* United States v. Stoller, 78 F.3d 710, 720 (1st Cir. 1996) ("*Halper* dichotomy should not be applied too far afield from its original context (monetary sanctions designed to make the government whole for

forfeitures "are designed primarily to confiscate property used in violation of the law, and to require disgorgement of the fruits of illegal conduct," not to punish.[84]

The *Ursery* Court distinguished *Austin* because it addressed an excessive fines question and *Ursery* dealt with a double jeopardy issue.[85] The Court added that *Kurth Ranch* was distinguishable because it addressed whether a tax, not a civil forfeiture, violated the prohibition against double jeopardy.[86] None of these cases dealt with the type of measure at issue in *Ursery*—civil *in rem* forfeiture.[87] In distinguishing these three cases, *Ursery* clarified that *Halper*, *Austin* and *Kurth Ranch* did not purport to change the existing understandings of civil forfeiture and double jeopardy.[88]

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traceable losses)."), *cert. dismissed*, 117 S. Ct. 378 (1996); United States v. Hernandez-Fundora, 58 F.3d 802, 806 (2d Cir. 1995) (refusing to apply *Halper* punishment test to professional disciplinary context); Manocchio v. Kusserov, 961 F.2d 1539, 1541-42 (11th Cir. 1992) (holding that *Halper* analysis is not applicable to administrative order barring doctor from participating in federal Medicare program and applying totality of circumstances test to find that purpose of exclusion was to protect public). The Supreme Court confirmed this limitation of *Halper* and circuit courts have dutifully followed. *See Ursery*, 116 S. Ct. at 2147 (stating that *Halper* was limited to cases addressing constitutionality of fixed penalties); *see also* United States v. Imngren, 98 F.3d 811, 814 (4th Cir. 1996) ("*Ursery* makes clear that *Halper* 'was limited to the context of civil penalties.'" (quoting *Ursery*, 116 S. Ct. at 2144)); United States v. Glymph, 96 F.3d 722, 725-26 (4th Cir. 1996) (discussing limits of *Halper* after *Ursery*); United States v. Borjesson, 92 F.3d 954, 956 (9th Cir. 1996) (noting that, in *Ursery*, Supreme Court found *Halper*'s calculus inapplicable because it is "virtually impossible to quantify, even approximately, the non-punitive purposes served by a particular civil forfeiture").

84. *Ursery*, 116 S. Ct. at 2145.

85. *Id.* at 2143-44 ("We limited our review [in *Austin*] to the question 'whether the Excessive Fines Clause of the Eighth Amendment applies to forfeitures of property under 21 U.S.C. §§ 881(a)(4) and (a)(7).'" (quoting Austin v. United States, 509 U.S. 602, 604 (1993))). The Court emphasized that the only discussion of double jeopardy in *Austin* is to confirm that civil forfeiture does not render itself to a double jeopardy protection. *See id.* at 2146 (noting Excessive Fines Clause is not "parallel to, or even related to" Double Jeopardy Clause).

86. *See id.* at 2146 (stating that tax statutes serve purpose different from civil penalties and that *Halper*'s method of determining whether exaction is remedial or punitive does not work with tax statues).

87. *Id.* at 2143-47 (distinguishing *Ursery* from *Halper*, *Austin* and *Kurth Ranch*). In reaffirming the rule that civil forfeiture does not violate the Double Jeopardy Clause, the Court drew a distinction between civil *in rem* forfeiture and *in personam* forfeiture. *See id.* The Court explained that *in personam* civil sanctions could be punitive, but civil *in rem* forfeiture could not. *See id.* at 2141; *see also* Various Items of Personal Property v. United States, 282 U.S. 577, 581 (1931) (stating that *in rem* proceedings are not punitive under Constitution because "[i]t is the property which is proceeded against, and, by resort to a legal fiction, held guilty and condemned as though it were conscious instead of inanimate and insentient. In a criminal prosecution it is the wrongdoer in person who is proceeded against, convicted and punished").

88. *Ursery*, 116 S. Ct. at 2147 ("[N]othing in *Halper*, *Kurth Ranch*, or *Austin*, purported to replace our traditional understanding that civil forfeiture does not constitute punishment for the purpose of the Double Jeopardy Clause."). The

Because *Halper*, *Austin* and *Kurth Ranch* were not of precedential significance, the Court in *Ursery* used the rule articulated in *United States v. One Assortment of 89 Firearms*[89] to resolve the issue at hand.[90] In *89 Firearms*, the Supreme Court articulated a two-part test for assessing whether a measure constitutes punishment.[91] Under that test, a court must first ask "whether Congress intended [the] proceedings . . . to be criminal or civil."[92] Second, the court must inquire "whether the [effects of the] proceedings are so punitive in fact" that the court cannot conclude that they are "civil in nature."[93] In applying this test, the Court held that civil *in rem* forfeiture proceedings are not punishment.[94]

III. THE THIRD CIRCUIT NAVIGATES THROUGH THE SUPREME COURT'S MAZE

A. Artway v. Attorney General: *A Pre-*Ursery *Synthesis Addressing the Constitutionality of Megan's Law*

Halper, *Austin* and *Kurth Ranch* elucidate a number of factors for determining whether a civil penalty amounts to unconstitutional punishment.[95] The factors and conclusions drawn in this trilogy of cases have,

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Court further noted that "[i]t would have been quite remarkable for this Court to have held unconstitutional a well-established practice, and to have overruled a long line of precedent, without having even suggested that it was doing so." *Id.*

89. 465 U.S. 354 (1984).

90. *See Ursery*, 116 S. Ct. at 2147 (adopting two-part test in *89 Firearms*).

91. *89 Firearms*, 465 U.S. at 362-63 (adapting test used in United States v. Ward, 448 U.S. 242, 248 (1980)).

92. *Ursery*, 116 S. Ct. at 2147 (citing *89 Firearms*, 465 U.S. at 366); *see Ward*, 448 U.S. at 248 (stating that question of determining punitive nature of civil *in rem* forfeiture statute "proceed[s] on two levels," intent of Congress and effects of measure); One Lot Emerald Cut Stones v. United States, 409 U.S. 232, 237 (1972) ("[Q]uestion of whether a given sanction is civil or criminal is one of statutory construction.").

93. *Ursery*, 116 S. Ct. at 2147 (citing *89 Firearms*, 465 U.S. at 366).

94. *See id.* at 2149 (stating civil forfeiture does not constitute punishment for purpose of Double Jeopardy Clause). The Court explained that forfeiture proceedings historically have been viewed as civil because they are an action against a thing, in contrast to "the *in personam* nature of criminal actions." *Id.* at 2147 (citing *89 Firearms*, 465 U.S. at 363). In *Ursery* the Court pointed out that, if the intention of Congress was to establish a civil penalty, then the court must probe further to ascertain whether the effect of the penalty was so punitive as to negate any purpose to the contrary. *See id.* 2147-48 (noting when not to give effect to Congress's intent). This should be evidenced by the "'clearest proof' that Congress has provided a sanction so punitive as to 'transfor[m] what was clearly intended as a civil remedy into a criminal penalty.'" *Id.* at 2142 (quoting *89 Firearms*, 465 U.S. at 366). The Court went on to explain that the effects of the forfeiture in § 881(a)(6) and (a)(7) were not so harsh as to rebut the traditional intention of nonpunishment. *See id.* at 2148 (declining to find sanctions "so punitive" as to render them criminal).

95. *See* Artway v. Attorney General, 81 F.3d 1235, 1263 (3d Cir. 1996) (analyzing various factors set forth in *Halper*, *Austin* and *Kurth Ranch* for assessing punitive nature of civil sanction). For a discussion of the factors on which the Supreme

however, caused great confusion in the lower courts.[96] In *Artway v. Attorney General*,[97] a pre-*Ursery* case, the Third Circuit faced the issue of whether the registration and notification provisions of Megan's Law violated the Bill of Attainder, Double Jeopardy and Ex Post Facto Clauses of the Constitution.[98] In response to the arduous task of interpreting the relevant Supreme Court cases, the Third Circuit synthesized those cases and established a three-prong test for determining whether a civil sanction constitutes punishment for constitutional purposes.[99]

Alexander Artway served seventeen years in jail for a sex offense.[100] After he was released, Artway settled in a community, secured employment and married.[101] On October 31, 1994, however, New Jersey enacted Megan's Law.[102] Megan's Law requires that previous sex offenders regis-

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Court focused in *Halper*, *Austin* and *Kurth Ranch*, see *supra* notes 37-62 and accompanying text.

96. *See* Mack, *supra* note 9, at 218 (stating that shifts in law of Supreme Court jurisprudence have created "entirely new areas of double jeopardy interpretation with respect to parallel civil and criminal proceedings"); *see also* United States v. Stoller, 78 F.3d 710, 713 (1st Cir. 1996) (noting that extent of application of *Halper*, *Austin*, and *Kurth Ranch* is unclear), *cert. dismissed*, 117 S. Ct. 378 (1996). For a list of cases that represent a circuit split over the extent of the application of *Halper*, *Austin* and *Kurth Ranch*, see *supra* note 17.

97. 81 F.3d 1235 (3d Cir. 1996).

98. *Id.* at 1247.

99. *See id.* at 1263 (synthesizing uniform test for constitutional jurisprudence). The *Artway* test suggests a method of analysis for generally assessing whether a measure is punishment under the Bill of Attainder Clause, Double Jeopardy Clause and Ex Post Facto Clause. *See id.* at 1253-54 (noting purpose of test is to determine "whether the legislative aim was to punish"). The Third Circuit explained that it would not "distinguish among the Ex Post Facto, Bill of Attainder, and Double Jeopardy Clauses; their differences with respect to the requisites of 'punishment,' if any, are not relevant here." *Id.* at 1247. The *Artway* analysis is not, however, applicable for assessing whether a statutory sanction violates the Excessive Fines Clause. *See* United States v. Various Computers and Computer Equipment, 82 F.3d 582, 587-89 (3d Cir. 1996) (analyzing post-*Artway* excessive fines claim under different analysis than *Artway*), *cert. denied*, 117 S. Ct. 406 (1996); *see also* Taylor v. Cisneros, 102 F.3d 1334, 1341 (3d Cir. 1996) (explaining that court should analyze excessive fines issue directly under *Austin* and *Various Computers*, and not under *Artway*). For a discussion of *Various Computers*, see *infra* note 155 and accompanying text. For a discussion of *Taylor*, see *infra* notes 123-74 and accompanying text.

100. *See Artway*, 81 F.3d at 1242. A jury convicted Artway in 1971 of sodomy. *See id.* at 1243. The judge found that Artway used force and sentenced him to an indefinite term in prison. *See id.* Based on a previous statutory rape charge, the sentencing judge characterized Artway's actions as "a pattern of repetitive, compulsive behavior." *Id.* Artway was released in 1992. *See id.*

101. *See id.*

102. N.J. STAT. ANN. §§ 2C:7-1 to :7-5 (West 1995). Megan's Law was the first of many sexual predator registration and notification laws that have emerged in various states around the country. *See Artway*, 81 F.3d at 1250 n.11. The law is composed of a registration requirement, triggered if at sentencing the behavior was "characterized by a pattern of repetitive, compulsive behavior," along with three tiers of notification. *See* N.J. STAT. ANN. § 2C:7-2b(1) (West 1996). The registrant must provide personal information to the local law enforcement: his or her

name, social security number, age, race, sex, date of birth, height, weight, hair and eye color, address of legal residence and date and place of employment. *See id.* § 2C:7-4b(1). Every 90 days, the registrant must confirm his or her address, notify the authorities if he or she moves and register again at the new location with local authorities. *See id.* §§ 2C:7-2d to -2e. Law enforcement agencies are authorized to release "relevant and necessary information [concerning registrants] when . . . necessary for public protection." *Id.* § 2C:7-5a. The prosecutor of the county in which the registrant lives is responsible for reviewing the registrant's information and ascertaining whether the registrant represents a low, moderate or high risk of repeat offense. *See id.* § 2C:7-8d(1). The Attorney General has promulgated guidelines for determining which registrants are low, moderate or high risks. *See Artway*, 81 F.3d at 1244; *see also* N.J. STAT. ANN. §§ 2C:7-8a to -8b (authorizing risk scale promulgated by Attorney General). The guidelines contemplate the following factors in determining risk: (1) seriousness of the offense, (2) offense history, (3) characteristics of the offender and (4) community support. *See Artway*, 81 F.3d at 1244. These four factors are comprised of a matrix of 13 other factors: degree of force, degree of contact, age of victim, victim selection, number of offenses and victims, duration of offensive behavior, length of time since last offense, history of antisocial acts, response to treatment, substance abuse, therapeutic support, residential support and employment and educational stability. *See id.* at 1244 n.2. In considering all these factors, the prosecutor will place the registrant in Tier 1 (low risk), Tier 2 (moderate risk) or Tier 3 (high risk). *See id.* Under Tier 2, the prosecutor must notify schools, licensed day care centers, summer camps and designated community organizations involved in the care of children or the support of battered women or rape victims. *See* N.J. STAT. ANN. § 2C:7-8c(2). Under Tier 3, law enforcement agencies must notify members of the public likely to encounter the registrant. *See id.* § 2C:7-8c(3). Every state has enacted a sexual predator registration law, notification law or both. *See* People v. Ross, 646 N.Y.S.2d 249, 250 (1996) (noting universal sex offender registration requirements); *see also* ALA. CODE § 13A-11-200 (1994); ALASKA STAT. §§ 12.63.010, 18.65.087 (Michie 1996); ARIZ. REV. STAT. ANN. §§ 13-3821, 41-1750(B) (West 1996); ARK. CODE ANN. § 12-12-901 (Michie 1995); CAL. PENAL CODE § 290 (West 1996 & Supp. 1997); COLO. REV. STAT. § 18-3-4123.5 (1996); CONN. GEN. STAT. ANN. § 54-102r (West 1997); DEL. CODE ANN. tit. 11, § 4120 (1995); FLA. STAT. ANN. § 775.21 (West 1997); GA. CODE ANN. § 42-1-12 (1997); HAW. REV. STAT. §§ 707-743 (1995); IDAHO CODE §§ 18-8301 to -8311 (1997); 730 ILL. COMP. STAT. §§ 150/1-150/10 (West 1995); IND. CODE ANN. §§ 5-2-12-1 to -12 (West 1996); IOWA CODE ANN. §§ 692A.1-.13 (West 1997); KAN. STAT. ANN. §§ 22-4902 to -4907 (1996); KY. REV. STAT. ANN. § 17.510 (Michie 1996); LA. REV. STAT. ANN. §§ 15:540 to :549 (West 1997); ME. REV. STAT. ANN. tit. 34-A, §§ 11003-11004 (West 1996); MD. CODE ANN. art. 27, § 629B (1996); MASS. GEN. LAWS ANN. ch. 22, § 37 (West 1994); MICH. COMP. LAWS ANN. §§ 28.721-.730 (West 1997); MINN. STAT. ANN. § 243.166 (West 1997); MISS. CODE ANN. § 45-33-1 (1997); MO. ANN. STAT. § 566.600 (West 1997); MONT. CODE ANN. §§ 46-23-501 to -507 (1995); NEB. REV. STAT. §§ 29-4001 to -4013 (1996); NEV. REV. STAT. ANN. §§ 207.151-.157 (Michie 1997); N.H. REV. STAT. ANN. § 651-B:1 to -B:9 (1996); N.J. STAT. ANN. §§ 2C:7-1 to :7-5 (West 1996); N.M. STAT. ANN. §§ 29-11A-1 to -8 (Michie 1996); N.Y. CORRECT. LAW § 168 (McKinney 1997); N.C. GEN. STAT. §§ 14-208.5-.13 (1996); N.D. CENT. CODE § 12.1-32-15 (1995); OHIO REV. CODE ANN. §§ 2950.01-.08 (Anderson 1996); OKLA. STAT. ANN. tit. 57, §§ 581-587 (West 1997); OR. REV. STAT. §§ 181.594-.600 (1996); 42 PA. CONS. STAT. ANN. §§ 42-9791 to -9798 (West 1997); R.I. GEN. LAWS §§ 11-37-16, -19 (1996); S.C. CODE ANN. §§ 23-3-400 to -490 (Law Co-op. 1996); S.D. CODIFIED LAWS §§ 22-22-39 to -41 (Michie 1997); TENN. CODE ANN. §§ 40-39-101 to -108 (1996); TEX. CIV. PRAC. & REM. CODE ANN. § 4413(51) (West 1997); UTAH CODE ANN. § 77-27-21.5 (1997); VT. STAT. ANN. tit. 13, §§ 5401-5413 (1997); VA. CODE ANN. §§ 19.2-298.1-.3, 19.2-390.1 (Michie 1997); WASH. REV. CODE ANN. § 9A.44130 (West Supp. 1997); W. VA. CODE §§ 61-8F-1 to -10 (Supp. 1997); WIS. STAT. ANN. § 175.45 (West 1996); WYO.

ter with their local law enforcement authority.[103] The law also requires community notification for registrants who are considered to present a future risk of sex offenses.[104] Artway filed suit in the United States District

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STAT. ANN. §§ 7-19-301 to -306 (Michie 1997). The laws in Alaska, Arizona, California, Connecticut, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Louisiana, Maine, Montana, Nevada, New Jersey, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Virginia and Washington all have notification provisions as well as registration provisions. *See Ross*, 646 N.Y.S.2d at 250. Statutes in Iowa and North Carolina show a trend toward limited public disclosure, specifically, release of the person's name to the person making the request. *See* State v. Myers, 923 P.2d 1024, 1028 (Kan. 1996), *cert. denied*, 117 S. Ct. 2508 (1997). In Vermont, certain employers can request and receive certain information when deemed necessary to protect the public. *See id.* In New York and New Jersey, the laws provide for community notification concerning certain registered sex offenders, depending on the risk level of the offender. *See id.* at 1029. In Pennsylvania, the newly enacted sex offender registration law only applies to sex offenses committed after the law's enactment. *See* 42 PA. CONS. STAT. ANN. § 9793. Georgia's sex offender registration act only applies to child sex offenses. *See* GA. CODE ANN. § 42-9-44.1(a) (1997).

103. N.J. STAT. ANN. § 2C:7-2 (stating qualified offender "shall register"); *see also* Simeon Schopf, *"Megan's Law": Community Notification and the Constitution*, 29 COLUM. J.L. & SOC. PROBS. 117, 120 (1995) (noting that community notification provisions of New Jersey's Megan's Law is most far reaching of all state laws requiring either registration or notification of sex offenders); Elga A. Goodman, Comment, *Megan's Law: The New Jersey Supreme Court Navigates Uncharted Waters*, 26 SETON HALL L. REV. 764, 766 n.20 (1996) (stating that New Jersey sexual predator law is most far reaching of all states because it is only statute that allows for notification to law enforcement, schools, day care, youth organizations and general public and because New Jersey law requires registration and notification for sex crimes committed prior to its enactment).

104. *See* N.J. STAT. ANN. § 2C:7-6 to 7-8 (noting criteria and guidelines for community notification). In 1994, the New Jersey Legislature enacted Megan's Law. *See id.* § 2C:7-1 (noting effective date of Megan's Law). The New Jersey Legislature enacted this law in response to the brutal murder of seven year-old Megan Kanka. *See Artway*, 81 F.3d at 1243 (noting origins of law). Megan's murderer was a neighbor who lived across the street from her and her family. *See id.* The neighbors did not know that this neighbor was a twice-convicted sex offender. *See id.* Then, the legislation "was rushed to the Assembly floor as an emergency measure, skipping the committee process, and was debated only on the floor; no member voted against it." *Megan's Law: How Fair? How Effective?*, PHILA. INQUIRER, Oct. 9, 1994, at E1 (noting that New Jersey Legislature "moved with swiftness unusual for legislative bodies" when enacting Megan's Law and that many legislators had objections to Megan's Law, but none were voiced); *see also* Douglas A. Campbell, *"Megan's Law": Is There Really a Right to Know? A Slaying Brings a Call For Action. Consider the Offender, Therapists Say*, PHILA. INQUIRER, Aug. 7, 1994, at E1 ("The [public] cry was heard along Barbara Lee Drive from the Kankas' neighbors. It was heard from politicians from Trenton to Washington.").

In May of 1996, President Clinton signed the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program Act ("Act"), 42 U.S.C. § 14071 (1994 & Supp. 1997). *See Myers*, 923 P.2d at 1028 (noting federal statute urging states to implement registration laws for sex offenders). The Act was amended to include Megan's Law, authorizing disclosure for any purpose permitted under state law: "A law enforcement agency 'shall release relevant information that is necessary to protect the public concerning a specific person required to register.'" *Id.* at 1028 (quoting Megan's Law, Pub. L. No. 104-145, 110 Stat. 1345 (1996)). The Act puts the responsibility on the states to enact a sexual predator

Court for the District of New Jersey challenging Megan's Law.[105] The district court held that the registration provisions of Megan's Law did not violate the Constitution although it enjoined enforcement of the notification aspects of the law's retroactive application.[106] Both parties appealed to the Third Circuit.[107]

To answer the question of whether the registration provision of Megan's Law constituted punishment, the Third Circuit synthesized the relevant Supreme Court case law and extracted a rule of law as to what constitutes punishment under the bill of attainder, double jeopardy and ex post facto protections of the Constitution.[108] According to the Third

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law as a condition to receiving federal funds. *See* Sabin, *supra* note 27, at 335 n.35 (noting that some states could lose up to 10% of funds that this Act allocates if states do not enact sexual predator registration laws). The Act requires registration, but not notification. 42 U.S.C. § 14071(d) (listing what information "may be disclosed"). The Act does allow the states to require notification. *Id.* § 14071(d)(1)-(2) (stating information collected in state programs "may be released" to protect public). The Act does not apply the registration requirements retroactively. *Id.* § 14071(b) (noting person must first be released from prison, parole, supervised release or probation in order to be required to register).

105. *See* Artway v. Attorney General, 876 F. Supp. 666, 677 (D.N.J. 1996), *aff'd in part, vacated in part*, 81 F.3d 1235 (3d Cir. 1996).

106. *See id.* at 692 (finding that retroactive application of notification provisions violated Ex Post Facto Clause).

107. *See Artway*, 81 F.3d at 1242. Initially, the State argued that Artway's constitutional claims regarding Megan's Law were moot because he had moved out of New Jersey. *See id.* at 1245-46 (noting Artway's duty to register kept him from returning to New Jersey). The court rejected this argument. *See id.* The court explained that the "opportunity for meaningful relief is still present here" because Artway asserted that he will move back into New Jersey if the court found Megan's Law unconstitutional. *See id.* at 1246.

The State also asserted that Artway's challenges were not ripe because there was no "case or controversy." *See id.* at 1247. In analyzing the ripeness issue, the court "distinguish[ed] between the registration and notification provisions of Megan's Law." *Id.* The court noted that the constitutionality of Megan's Law could possibly turn "on the most careful parsing of the Supreme Court's rulings on 'punishment' . . . [and] the law in this area needs clarification." *Id.* at 1250-51. The court pointed out that whether Artway will ever be subject to the notification provisions of Megan's Law remains to be seen. *See id.* at 1251. As such, the court held that under Article III of the Constitution, it could not undertake to dispose of this issue "without factual tools." *Id.* at 1250-51.

108. *See id.* at 1254 (noting that court must devise test for punishment because of confused state of law in this area). In simulating this test, the Third Circuit rejected the relevancy of *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963). *See Artway*, 81 F.3d at 1261. The Third Circuit in *Artway* stated that, in *Mendoza-Martinez*, "the [Supreme] Court held that divesting American citizenship for draft evasion or military desertion was 'punishment' requiring the procedural protections of the Fifth and Sixth Amendments." *Id.* According to the Third Circuit, *Mendoza-Martinez* requires analysis of seven factors to determine whether a sanction constitutes punishment:

> [1] whether the sanction involves an affirmative disability or restraint, [2] whether it has historically been regarded as punitive, [3] whether it comes into play only on a finding of scienter, [4] whether its operation will promote the traditional aims of punishment—retribution and deterrence, [5] whether the burden to which it applies is already a crime, [6]

Circuit, "[a] measure must pass a three-prong analysis—(1) actual purpose, (2) objective purpose, and (3) effect—to constitute non-punishment."[109]

The Third Circuit derived the first prong, actual purpose, from the emphasis the Supreme Court placed on the subjective legislative purpose of the statute in *De Veau v. Braisted*.[110] The court derived the second prong, objective purpose, from the Supreme Court's guidance in *Halper*, *Austin* and *Kurth Ranch*.[111] Under this prong, the reviewing court must ask three questions.[112] First, under *Halper*, the court should ask if the sanction serves solely a remedial purpose.[113] Second, following *Austin*, the court must determine if historical analysis illustrates whether the court should regard the measure as punishment.[114] Third, under *Kurth Ranch*,

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whether an alternative purpose to which it may rationally be connected is assignable for it, [7] whether it appears excessive in relation to the alternative purpose.

Id. at 1261-62. The district court employed this test, but the Third Circuit refused to extend *Mendoza-Martinez* beyond the determination of whether a punishment is severe enough to invoke criminal procedural rights, such as a jury trial and proof beyond a reasonable doubt. *See id.* at 1262 (noting Supreme Court has made clear that *Mendoza-Martinez* factors are not controlling on "punishment" determination). *But see Myers*, 923 P.2d at 1040 (invoking *Mendoza-Martinez* factors in addressing whether Kansas's sexual predator registration and notification law violated Ex Post Facto Clause).

109. *Artway*, 81 F.3d at 1263.

110. *See id.* (adopting test in *De Veau*). The *Artway* court stated that in *De Veau*, "the Supreme Court announced a subjective (or actual) legislative purpose test." *Id.* at 1254. The Third Circuit explained that

> [t]he question in each case where unpleasant consequences are brought to bear upon an individual for prior conduct, is whether the legislative aim was to punish that individual for the past activity, or whether the restriction of the individual comes about as a relevant incident to a regulation of a present situation.

Id.

111. *See id.* 1254-59 (analyzing development of "objective purpose" test).

112. *See id.* at 1263 (noting subparts of "objective purpose" test).

113. *See id.* (citing United States v. Halper, 490 U.S. 435, 448 (1989)). According to the Third Circuit, *Halper* articulates the "threshold question . . . whether a remedial purpose can explain the sanction. Only if the remedial purpose is insufficient to justify the measure, and one must resort also to retributive or deterrent justifications, does the measure become punitive." *Id.* at 1255. To illustrate its interpretation of *Halper*, the Third Circuit offered a hypothetical: "[A]ssume that someone is sent to the store in the snow for soupmeat. The trip can be explained solely by the remedial purpose of obtaining food, even though the trip through the cold could also serve retributive purposes." *Id.* at 1255-56. According to the Third Circuit, this would not be punishment under *Halper*. *See id.* at 1256. The court explained: "[A]ssume now that, without additional justification, the agent is sent without clothes. This additional aspect of the trip cannot be explained by the remedial purpose of obtaining food; this excursion can only be explained as partly serving retributive purposes. It therefore constitutes 'punishment' under . . . *Halper* . . . ." *Id.*

114. *See id.* (citing Austin v. United States, 509 U.S. 602, 610 (1993)). The court again explained, through a hypothetical, that "sending someone out into the snow would be punishment if doing so was traditionally regarded as punitive and

the court must inquire into the true nature of the purported salutary purpose of the provision.[115] Under the third and final prong of the *Artway* test, the court must look to the effects of the measure.[116] The Third Circuit explained that a focus on effects is necessary to balance the possibility that a legislature may have the best of intentions and still effectuate a measure that is too harsh to be considered nonpunitive.[117]

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the sender did not make his plausible remedial purposes clear. This would be the case even though a remedial purpose—fetching soupmeat—could fully explain the action." *Id.* at 1257 (emphasis omitted). Although *Austin* suggested focusing on history, the Third Circuit applied it with some hesitancy because *Austin* analyzed what constitutes punishment for purposes of the Excessive Fines Clause, an issue not before the court in *Artway*. *See id.* at 1258 (noting methodology of *Austin* is applicable to other punishment determinations). The court questioned whether *Austin* establishes "that 'punishment' for purposes of one constitutional protection is necessarily 'punishment' for another." *Id.* In this regard, the Third Circuit disagreed with other circuits' conclusory holding that *Austin* categorically applies to all cases regarding analysis of the punishment question. *See id. But see* United States v. $405,089.23 U.S. Currency, 33 F.3d 1210, 1219 (9th Cir. 1994) ("We believe that the only fair reading of *Austin* is that it resolves the 'punishment' issue with respect to forfeiture cases for purposes of the Double Jeopardy Clause as well as the Excessive Fine Clause."), *rev'd*, 116 S. Ct. 2135 (1996). The Third Circuit rejected the Ninth Circuit's reading of *Austin* as "resolving all forfeitures . . . as presumptively punishment for purposes of the Double Jeopardy Clause." *Artway*, 81 F.3d at 1258; *see also* United States v. $184,505.01 United States Currency, 72 F.3d 1160, 1168 (3d Cir. 1995) (rejecting holding and reasoning of Ninth Circuit in *$405,089.23 U.S. Currency*). Nevertheless, the Third Circuit found the historical methodology of *Austin*, as opposed to its broad language and holding, applicable to other punishment determinations. *See Artway*, 81 F.3d at 1258 (noting that "historical analysis is a staple of constitutional interpretation").

115. *See Artway* 81 F.3d at 1258 (noting that even some deterrent purpose in remedial measures does not render measure "punishment"). In this regard, the court should determine (1) whether historically the deterrent purpose of such a law is a necessary complement to its salutary operation and (2) whether the measure under consideration operates in its "usual" manner, consistent with its historically mixed purposes. *See id.* (citing Department of Revenue v. Kurth Ranch, 511 U.S. 767, 780-84 (1994)). The Third Circuit elaborated that "[t]he main significance of the *Kurth Ranch* limitation is that, at least for measures that have historically served salutary functions, even some deterrent purpose will not render a measure 'punishment.'" *Id.* at 1259 (emphasis omitted). The Third Circuit noted that this interpretation of *Kurth Ranch* is contrary to the First Circuit's interpretation in *Stoller*. *See id.* (disagreeing with First Circuit's interpretation of *Halper* and *Kurth Ranch* in situations not involving fines or taxes). The First Circuit held in *Stoller* that the *Kurth Ranch* decision was the general rule, except for in the situation of monetary penalties, which should be decided under *Halper*. United States v. Stoller, 78 F.3d 710, 718 (1st Cir. 1996) (concluding that *Kurth Ranch* created "totality of the circumstances" test and *Halper* is "exception" for "monetary penalties"), *cert. dismissed*, 117 S. Ct. 378 (1996). The Third Circuit refused to read *Halper* as narrowly as the First Circuit in the absence of specific instruction from the Supreme Court. *See Artway*, 81 F.3d at 1259 n.24 (determining *Halper* and *Kurth Ranch* must be synthesized). For a further discussion of *Stoller*, see *supra* note 36.

116. *Artway*, 81 F.3d at 1263.

117. *See id.* at 1260 ("[A] law can constitute unconstitutional 'punishment' because of its effects."). The court noted that a measure with a harsh "sting" will not render a measure "punishment" per se. *See id.* at 1261. Sometimes, however, a

In applying the test to Megan's Law, the court concluded that the law's registration provisions, as they applied to Artway, did not violate the Constitution.[118] Applying the first prong, the Third Circuit noted that the New Jersey Legislature enacted Megan's Law to combat "the danger of recidivism posed by sex offenders and offenders who commit other predatory acts against children."[119] Losing on the first prong, Artway argued under the second inquiry that the objective purpose of the legislation produced a nonremedial result.[120] The Third Circuit disagreed and found that the remedial objective of knowing the whereabouts of sex offenders outweighed the fact that "the registrant may face some unpleasantness from having to register and update his registration."[121] Finally, the Third Circuit found that, under the third prong, the sting of the registration provisions of the statute were not too harsh in effect.[122]

"'sting' will be so sharp that it can only be considered punishment regardless of the legislators' subjective thoughts. For example, the legislature with the purest heart(s), could extend the prison sentences of all previously convicted sex offenders for the sole reason of protecting potential future victims." *Id.*

118. *See id.* at 1267 ("[W]e conclude that registration under Megan's Law does not constitute 'punishment' under any measure of the term.").

119. *Id.* at 1264. The court noted that there was limited evidence of the actual purpose of Megan's Law because of the way that the law was rushed into enactment. *See id.*; *see also Megan's Law: How Fair? How Effective?*, *supra* note 104, at E1 (noting that New Jersey Legislature moved quickly when enacting Megan's Law, which was unusual for legislative bodies).

120. *See Artway*, 81 F.3d at 1265. Artway argued that the statute inflicted the shame of punishment. *See id.* Artway also argued that Megan's Law had an unconditionally punitive effect on him by comparing the measure to "'[e]arly forms of punishment contain[ing] strong elements of gross public humiliation . . . . Physical punishments . . . were carried out publicly in ceremonial fashion [because it was] intended that the victim should be humiliated, for degradation figured largely in all contemporary theories of punishment.'" *Id.* (alterations in original) (quoting Jon A. Brilliant, Note, *The Modern Day Scarlet Letter: A Critical Analysis of Modern Probation Conditions*, 1989 DUKE L.J. 1357, 1360-61 (1989)); *see also* Claire M. Kimball, Note, *A Modern Day Arthur Dimmesdale: Public Notification When Sex Offenders Are Released into the Community*, 12 GA. ST. U. L. REV. 1187, 1187 n.1 (1996) ("Laws that provide for community notification when sexual offenders are released are often referred to as 'scarlet letter laws' because they 'brand' the individual as sex offender in the eyes of the community."). The Third Circuit explained that these assertions were irrelevant because it evaluated only the registration provisions of Megan's Law. *See Artway*, 81 F.3d at 1265 ("[T]he notification issue is not before us."). The court concluded that the registration provisions "bear little resemblance to the Scarlet Letter," because they "[do] not involve public notification." *Id.*

121. *Artway*, 81 F.3d at 1265. The Third Circuit also noted that "the means chosen—registration and law enforcement notification only—is not excessive in any way." *Id.*

122. *See id.* at 1266-67. In finding that the effects of Megan's Law were not too harsh, the Third Circuit again emphasized that it was only addressing the registration provision of Megan's Law. *See id.* at 1266. Artway asserted a strong basis for concluding that notification would produce "devastating effects," but the court did not address the constitutionality of the notification provisions of Megan's Law. *Id.* The court explained that the impact of the registration provisions "cannot be said

B. Taylor v. Cisneros: *Explaining Where All the Pieces Fit in the Third Circuit*

In *Artway*, the Third Circuit "attempted to harmonize a body of doctrine that . . . caused much disagreement in the federal and state courts."[123] In formulating the *Artway* test, the Third Circuit explained that its analysis was "by no means perfect. Only the Supreme Court knows where all the pieces belong. The Court will, we hope, provide more guidance . . . in the near future."[124] In *Ursery*, the Supreme Court issued a decision that appeared to provide that guidance.[125] In *Taylor v. Cisneros*,[126] the Third Circuit addressed whether *Ursery*'s application to a state eviction proceeding was appropriate.[127]

1. *Facts of* Taylor

Silas Taylor used to reside in Bayonne, New Jersey, in low-income housing subsidized by the New Jersey Housing Authority.[128] In 1992, Taylor pleaded guilty to possession of narcotics paraphernalia in the Bayonne Municipal Court.[129] Taylor committed this offense on the property of the Housing Authority on which he resided, though not in his apartment.[130] In 1994, Taylor again pleaded guilty to the same offense, this time committed on the property adjacent to his apartment complex.[131] The Bayonne Municipal Court sentenced Taylor to thirty days in prison and to a fine of $625 on the second conviction.[132]

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to have an effect so draconian that it constitutes 'punishment' in any way approaching incarceration." *Id.* at 1267.

123. *Id.* at 1263.

124. *Id.*

125. United States v. Ursery, 116 S. Ct. 2135, 2139-42 (1996) (addressing constitutionality of civil forfeiture).

126. 102 F.3d 1334 (3d Cir. 1996).

127. *Id.* at 1343 (noting that "arguably *Ursery* [was] distinguishable" because it involved *in rem* proceedings).

128. *See id.* at 1336. The fair market rental value of Taylor's apartment was $706 a month. *See id.* Because the Housing Authority subsidized his rent, he paid only $125 a month in rent. *See id.* Taylor was also hearing and speech impaired. *See id.* His only income was a disability payment of $497 a month from social security. *See id.* The court concluded that, if evicted, Taylor would have no place to live and would become homeless. *See id.*

129. *See id.* (noting that possession of drug paraphernalia is violation of Comprehensive Drug Reform Act of 1987, N.J. STAT. ANN. § 2C:35-1).

130. *See Taylor*, 102 F.3d at 1336.

131. *See id.* (noting second offense was not committed on Housing Authority property).

132. *See id.* at 1337. The parties did not specify the penalty for Taylor's first offense, however, they did not dispute that it was similar to that of the second offense. *See id.*

These criminal penalties were not the end of the implications of the drug charges.[133] New Jersey's Anti-Eviction Act,[134] applicable to both public and private housing, outlines the circumstances under which a landlord may legally remove a tenant from a rental unit.[135] Under subsection 61.1n of the Anti-Eviction Act, if one is convicted or pleads guilty to an offense under the Comprehensive Drug Reform Act of 1987,[136] involving possession of drug paraphernalia "within or upon the leased premises or the building or complex of buildings and land appurtenant thereto . . . in which those premises are located, the landlord may evict the tenant."[137] Removal of a tenant pursuant to the Anti-Eviction Act is an *in personam* action.[138] Because Taylor pleaded guilty to such a charge, the Housing Authority was authorized to evict Taylor from his apartment.[139]

On November 29, 1994, the Housing Authority served notice on Taylor that it was removing him from the apartment pursuant to subsection 61.1n of the Anti-Eviction Act.[140] In response to the eviction proceeding, Taylor filed an action pursuant to 42 U.S.C. § 1983, asserting that his eviction would violate the Double Jeopardy Clause because he had previously been prosecuted and punished for the crime of possession of drug paraphernalia.[141] Taylor also asserted that his eviction would violate the Excessive Fines Clause of the Eighth Amendment of the Constitution and would violate his due process rights under the Fourteenth Amendment.[142]

2. *The District Court*

The district court held that Taylor's eviction did not violate either the Double Jeopardy or Excessive Fines Clauses of the Constitution.[143] The

133. *See id.* (noting conviction for drug offense on leased premises is sufficient grounds for removal).

134. N.J. STAT. ANN. § 2A:18-61.1 (West 1996).

135. *See id.* (listing 16 reasons for lawful eviction of tenant).

136. N.J. STAT. ANN. § 2C:35-1 (West 1996).

137. N.J. STAT. ANN § 2A:18-61.1n.

138. *See Taylor*, 102 F.3d at 1343.

139. *See id.* at 1337 ("[W]ithout question, the Housing Authority may evict Taylor under the Anti-Eviction Act . . . .").

140. *See id.* The court noted that the Housing Authority indicated that the removal notice was based upon both offenses, however, the court questioned whether the second offense could be the basis for Taylor's removal because the incident did not occur on the Housing Authority's property. *See id.* at 1337 n.1. Because the first incident clearly put Taylor within the scope of subsection 61.1n, the court considered it a nonissue. *See id.*

141. *See id.*

142. *See id.* The Housing Authority sought "summary dispossession" of Taylor's apartment in the Superior Court of New Jersey. *See id.* The state court stayed those proceedings, at Taylor's request, until the federal courts resolved his § 1983 claim. *See id.*

143. *See id.* at 1337-38. In the district court, the parties disagreed as to whether Taylor's claim should be considered an "as applied" challenge or a facial challenge to subsection 61.1n. *See* Taylor v. Cisneros, 913 F. Supp. 314, 318 (D.N.J. 1995), *aff'd*, 102 F.3d 1334 (3d Cir. 1996). An applied challenge to this statute

district court concluded that the eviction proceedings against Taylor were not intended to punish.[144] The court explained that the label on a statute, whether "civil" or "criminal," is not relevant.[145] The court pointed out that proceedings under subsection 61.1n of the Anti-Eviction Act are not intended to punish because "the eviction of . . . '[a] tenant is a rational and effective means of protecting all other tenants from activity antithetical to their health, safety and welfare.'"[146] The district court also rejected Taylor's excessive fines argument because it concluded that the sanction pursuant to subsection 61.1n was not punitive.[147]

3. *The Third Circuit*

On appeal to the Third Circuit, Taylor argued that his eviction under subsection 61.1n was punitive because it had a "retributive function," despite some remedial characteristics.[148] He claimed that under New Jersey law, an eviction constituted a forfeiture.[149] He further asserted that the court should consider his fine excessive because his offenses were minor.[150] Taylor also argued that the eviction proceeding violated the prohi-

would be based upon "the specific circumstance of Taylor's convictions and misfortune." *See id.* In other words, Taylor asserted that the statute at issue was not unconstitutional on its face, but rather that it was unconstitutional as it applied to him as an indigent who was being evicted from his subsidized housing and, most likely, being made homeless. *See id.* The court, however, concluded that because the state court had not applied the statute to the facts of this case it would be inappropriate to consider the case an "as applied challenge." *Id.* As such, the district court treated the action as a facial challenge. *See id.*

On appeal, Taylor argued that his challenge to 61.1n should not have been treated as a facial challenge. *See Taylor*, 102 F.3d at 1338. He explained that he did not challenge the general constitutionality of subsection 61.1n, but rather as it applied to him. *See id.* (citing United States v. Salerno, 481 U.S. 739, 745 (1987); Village of Hoffman Estates v. Flipside, 445 U.S. 489, 497 (1982); Jacobs v. Florida Bar, 50 F.3d 901, 905-06 (11th Cir. 1995)). The Third Circuit, however, did "not linger on the distinction between a facial and an as applied challenge because we find that subsection 61.1n is constitutional as applied to Taylor." *Id.* at 1339-40.

144. *See Taylor*, 102 F.3d at 1338.

145. *See id.* at 1337.

146. *Id.* at 1338 (quoting *Taylor*, 913 F. Supp. at 321). The district court noted that the causes for eviction in the Anti-Eviction Act are the only basis upon which a landlord may seek eviction outside "the traditional, and more cumbersome, common law ejectment action[s]." *Taylor*, 913 F. Supp. at 317. The court explained that the Anti-Eviction Act "is considered remedial legislation designed to address the serious housing shortage that has plagued New Jersey." *Id.*

147. *See Taylor*, 913 F. Supp. at 323.

148. *Taylor*, 102 F.3d at 1339 (quoting Brief for Appellant at 8, Taylor v. Cisneros, 102 F.3d 1334 (3d Cir. 1996) (No. 95-5873)).

149. *See id.* (citing A.P. Dev. Corp. v. Band, 550 A.2d 1220, 1222 (N.J. 1988); Carteret Properties v. Variety Donuts, Inc., 228 A.2d 674, 680 (N.J. 1967)).

150. *See id.* (citing Brief for Appellant at 23, *Taylor* (No. 95-5873)). Taylor argued that, based on the fact that he received a rental subsidy of $581 per month and he could potentially remain in the apartment for over the next 20 years, he is losing subsidies potentially worth more than $100,000. *See id.* He asserted such a loss was excessive compared to the offense. *See id.*

bition against double jeopardy because his eviction would not serve a remedial purpose, and moreover, that the court should render it punishment because eviction was a measure disproportionate to his conduct.[151]

Initially, the State of New Jersey argued that the *Artway* test controlled the definition of punishment for double jeopardy purposes.[152] The State then modified its position after the Supreme Court's decision in *Ursery* and asserted that *Ursery* undermined the *Artway* analysis and controlled in this case.[153]

At the outset of the opinion, the Third Circuit recognized the relevance of *Artway* and *Ursery*.[154] Instead of clarifying which case controlled in the disposition, the court resolved Taylor's double jeopardy claim under both *Ursery* and *Artway* and then addressed his excessive fine claim under *Austin*.[155] The court concluded that the eviction proceedings of

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151. *See id.*

152. *See id.* For a discussion of the *Artway* test, see *supra* notes 108-17 and accompanying text.

153. *See Taylor*, 102 F.3d at 1339.

154. *See id.* at 1341 ("*Artway* . . . and *Ursery* . . . inform our result.").

155. *See id.* The Third Circuit also noted that it would decide the excessive fines issue under *United States v. Various Computers and Computer Equipment*, 82 F.3d 582 (3d Cir. 1996), *cert. denied*, 117 S. Ct. 406 (1996). *See Taylor*, 102 F.3d at 1341. In *Various Computers*, the Third Circuit did not invoke the *Artway* test to reach its conclusion that civil *in rem* forfeiture under 18 U.S.C. § 981(a)(1)(C) does not violate the prohibition against double jeopardy. *See Various Computers*, 82 F.3d at 586-89. In *Various Computers*, the defendant pleaded guilty to one count of unauthorized use of a credit card pursuant to 18 U.S.C. § 1029(a)(2) and (a)(3). *See Various Computers*, 82 F.3d at 583. After the court sentenced the defendant for this criminal conduct, the Government instituted forfeiture proceedings pursuant to 19 U.S.C. § 981(a)(1)(C), which allows for the forfeiture of proceeds that were the subject of a § 1029 offense. *See id.* at 584 n.2. The court sentenced the defendant to 10 years in prison and ordered him to make restitution in the amount of $13,674.50. *See id.* at 584. In addressing whether this subsequent forfeiture action violated the Double Jeopardy Clause, the court followed the analysis of the Fifth Circuit in *United States v. Tilley*, 18 F.3d 295 (5th Cir. 1994). *See Various Computers*, 82 F.3d at 588. In *Tilley*, the Fifth Circuit held that forfeiture pursuant to 21 U.S.C. § 881(a)(6) and (a)(7) was not punishment because it does not take away anything in which the possessor had a legal interest or expectation that government should protect. *Tilley*, 18 F.3d at 300. The Third Circuit had already adopted the *Tilley* analysis in *United States v. $184,505.01 United States Currency*, 72 F.3d 1160 (3d Cir. 1995), *cert. denied*, 117 S. Ct. 48 (1996). *See Various Computers*, 82 F.3d at 588. In *$184,505.01 United States Currency*, the Third Circuit "[found] the Fifth Circuit's reasoning . . . to be sound." *$184,505.01 United States Currency*, 72 F.3d at 1172. As such, the court extended its analysis to 19 U.S.C. § 981(a)(1)(C) in *Various Computers*. *See Various Computers*, 82 F.3d at 588.

The defendant in *Various Computers* also asserted that the forfeiture under § 981(a)(1)(C) violated the Excessive Fines Clause of the Eighth Amendment. *Id.* at 589. The court explained that because the forfeiture provision of the statute does not constitute punishment, it cannot violate the Excessive Fines Clause. *See id.* (citing Austin v. United States, 509 U.S. 602, 607 (1993)). It is apparent from *Various Computers* that the question of whether a civil *in rem* forfeiture amounts to punishment for double jeopardy and excessive fine purposes is not properly analyzed under *Artway*. *See id.*

the Anti-Eviction Act passed all three prongs of the *Artway* test and, thus, were not punishment.[156]

Taylor argued that he would suffer severely from an eviction.[157] In addressing this argument, the Third Circuit pointed to the language in *Ursery* for assistance.[158] In *Ursery*, the Supreme Court explained that "for Double Jeopardy purposes we have never balanced the value of property forfeited in a particular case against the harm suffered by the Government in that case."[159] Thus, the Third Circuit incorporated the relevant teachings of *Ursery* into the *Artway* analysis in resolving an issue of whether a civil sanction is punitive.[160]

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156. *See Taylor*, 102 F.3d at 1342. Under the subjective prong, the Third Circuit began its analysis with the fact that the Anti-Eviction Act "provides that for certain residential properties a tenant may be removed only for 'good cause.'" *Id.* at 1341 (quoting N.J. STAT. ANN. § 2A:18-61.1n (West 1996)). The court concluded this requirement indicated that "61.1n . . . is nothing more than the legislature's recognition that it is unreasonable to deny a landlord the right to terminate a lease when its property is being used for purposes unlawful under the New Jersey Comprehensive Drug Reform Act of 1987." *Id.* Thus, under subsection 61.1n, the landlord has the discretion to remove a tenant. *See id.* This was enough proof for the court to hold that the purpose of subsection 61.1n was not to punish the tenant but to give the landlord the necessary legal force to keep his or her property safe. *See id.* ("[The Legislature] . . . merely permitted the landlord to protect its property from a tenant violating the law on the property.").

The court held that subsection 61.1n also passed the objective prong under *Artway*. *See id.* at 1342. The court addressed two questions under the *Artway* objective prong. In answering the first question under that prong, whether the section served solely a remedial purpose, the court explained that subsection 61.1n has "solely . . . the remedial purpose" of protecting a landlord from the dangers of having unlawful activity occur on his or her property. *Id.* The court explained that landlords should not be subjected to unlawful activity on their property because "under both federal and New Jersey law a landlord in some circumstances runs the risk of its property being forfeited if it is aware of unlawful drug activity on its premises and does not take steps to end that activity." *Id.* Under the second question of the *Artway* objective prong, whether history supports a punitive or remedial purpose of the measure, the court observed that "removal of a tenant from a property traditionally has not been regarded as a punishment." *Id.* The Anti-Eviction Act provides for eviction under other circumstances that could not be considered punitive. *See id.*

Finally, the court addressed the third and final prong of *Artway*, an inquiry into the effects of the measure. *See id.* The *Taylor* court held the effects of subsection 61.1n were not too harsh because that determination does not hinge on "the value of the property forfeited in a particular case . . . [or] the harm suffered by the government." *Id.*

157. *See id.* ("[Taylor] points out that the Supreme Court of New Jersey has said that a 'forfeiture is in the nature of a penalty.'"(quoting Lehigh Valley R.R. Co. v. Chapman, 171 A.2d 653, 660 (1961))).

158. *See id.* ("[I]n *Ursery*, the Supreme Court held that civil forfeitures generally do not constitute punishment for purposes of the Double Jeopardy Clause.")

159. United States v. Ursery, 116 S. Ct. 2135, 2145 (1996).

160. *See Taylor*, 102 F.3d at 1342. In *Ursery*, the Supreme Court distinguished *Halper* because it dealt with civil penalties and not civil forfeiture. *Ursery*, 116 S. Ct. at 2138. In *Taylor*, the Third Circuit noted that, according to the Supreme Court, *Halper* only extends to cases involving double jeopardy challenges to civil penalties, not civil forfeiture, because forfeiture does not invoke an analysis of balancing the

The court then explained that it only assumed the applicability of *Artway* after *Ursery*.[161] In conceding that assumption may not be correct, the court analyzed the case under *Ursery* as well.[162] The court explained that *Ursery* focused on *in rem* civil forfeiture and *Taylor* dealt with an *in personam* action.[163] Accordingly, the Third Circuit held that "arguably" this distinction could render *Ursery* inapplicable to *Taylor*.[164] Applying *Ursery*, the Third Circuit explained that the court must decide whether the legislature intended eviction proceedings under subsection 61.1n "to be criminal or civil and whether the proceedings are so punitive in fact that they may not be viewed as civil regardless of the legislature's intent."[165] Under that test, the court concluded that an eviction pursuant to the Anti-Eviction Act is not a punitive measure.[166] The court also concluded that an eviction under subsection 61.1n of the Anti-Eviction Act is not punitive for the reasons it set forth in the *Artway* analysis and for the historical understanding that evictions serve remedial purposes.[167]

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harm to the government against the cost of the forfeiture. *Taylor*, 102 F.3d at 1341 (citing *Ursery*, 116 S. Ct. at 2144). In *Taylor*, the court also explained that its conclusion that the effects of the eviction were not so harsh as to be considered punishment "[was] hardly surprising; if the termination of social security benefits, which can be critical to a disabled or elderly person, is not a punishment then why should the loss of a lease be punishment?" *Id.* at 1342.

161. *See Taylor*, 102 F.3d at 1342.

162. *See id.* at 1343.

163. *See id.* The distinction between *in rem* and *in personam* civil sanctions is significant in assessing whether a measure is punitive for constitutional purposes. *See Ursery*, 116 S. Ct. at 2138 (placing significant emphasis on fact that Congress did not intend forfeiture proceeding as punitive because action was *in rem* and not against person); United States v. One Assortment of 89 Firearms, 465 U.S. 354, 363 (1984) (same); United States v. LaFranca, 282 U.S. 568, 575 (1931) (holding that *in personam* proceeding to impose taxes upon defendant for sale of liquor is "an action to recover a penalty for an act declared to be a crime [and], in its nature, a punitive proceeding, although it take[s] the form of a civil action; and the word 'prosecution' is not inapt to describe such an action"); United States v. Reyes, 87 F.3d 676, 682 n.8 (5th Cir. 1996) ("The *Ursery* opinion . . . gives heavy emphasis to the *in rem* nature of the forfeitures there at issue, and distinguishes *Halper* and *Kurth Ranch* largely because those cases involved *in personam* proceedings.").

164. *Taylor*, 102 F.3d at 1343.

165. *Id.* (citing *Ursery*, 116 S. Ct. at 2147).

166. *See id.* (rejecting Taylor's claim under *Ursery* analysis).

167. *See id.* In *Taylor*, the Third Circuit also made some final points to solidify its conclusions concerning double jeopardy. *Id.* In this regard, the court noted that Taylor's double jeopardy claim failed because an eviction under subsection 61.1n is not part of the criminal system. *See id.* The Housing Authority is not a prosecutor. *See id.* Rather, in evicting Taylor, "the housing authority pursu[ed] a traditional civil remedy which both public and private landlords seek." *Id.* The court also pointed out that eviction under subsection 61.1n, unlike the registration provisions of Megan's Law at issue in *Artway*, is not mandatory. *See id.* The court also noted that a landlord could provide in a lease that the violation of drug laws on the premises is grounds for eviction. *See id.* Finally, the court commented that "[i]t would be strange" if a landlord was unable "to evict a tenant for drug activities because a prosecutor had brought criminal proceedings against the tenant for the activities." *Id.* at 1343-44. Such a result would unfairly increase the landlord's own

At the conclusion of the opinion, the court addressed Taylor's excessive fine argument under *Austin*.[168] The court explained that under *Austin*, "[t]he test for whether a civil in rem forfeiture constitutes punishment under the Excessive Fines Clause . . . is slightly different" from the double jeopardy analysis.[169] The Third Circuit explained that *Austin* mandates a two-part inquiry for assessing the punitive nature of a forfeiture statute.[170] First, the court should assess whether forfeiture was understood as punishment when the United States ratified the Eighth Amendment.[171] Second, the court should assess whether the forfeiture involved in the case at bar "should be so understood today."[172] The Third Circuit explained that the second prong of the *Artway* analysis, the objective prong, incorporates that inquiry.[173] Having already determined that subsection 61.1n was not punitive, the court concluded that it also did not violate the Excessive Fines Clause.[174]

C. *The Current State of the Law in the Third Circuit*

In *E.B. v. Verniero*,[175] the Third Circuit clarified the precedential impact of *Ursery* on *Artway*.[176] In *Verniero*, the court upheld the constitutionality of the notification provisions of Megan's Law, a question the court left open in *Artway*.[177] The convicted sex offenders in *Verniero* argued that

risk of forfeiting his property to the state or federal government for failing to report such activities. *See id.* at 1344.

168. *See id.* at 1344.

169. *Id.* ("[T]hus, even though the state proceeding against Taylor [was] in personam, Taylor [had] less of a burden in meeting the Excessive Fines Clause standard.")

170. *See id.*

171. *See id.* (citing Austin v. United States, 509 U.S. 602, 610-611 (1993)).

172. *Id.* (citing *Austin*, 509 U.S. at 610-11).

173. *See id.* For a discussion of the objective prong of the *Artway* test, see *supra* notes 111-15 and accompanying text.

174. *See Taylor*, 82 F.3d at 1344 (affirming judgment of lower court).

175. 119 F.3d 1077 (3d Cir. 1997).

176. *Id.* at 1093-94 (stating that *Ursery* does not undermine appropriateness of *Artway*).

177. *Id.* at 1092-1105. For a discussion of why the Third Circuit declined to address the constitutionality of the notification provisions of Megan's Law, see *supra* note 120.

In *Verniero*, the named appellant registered with the authorities subsequent to his parole for sex crimes against young boys. *See Verniero*, 119 F.3d at 1087-88. The New Jersey Superior Court, upon consideration of objection from E.B., held that he was properly classified as a Tier 3 offender and that notification was appropriate to 82 public and private educational institutions, licenced day care centers and summer camps and all residences within a one block radius of E.B.'s house. *See id.* at 1088. For a discussion of the classification of offender status under Megan's Law, see *supra* note 102.

The court held that the notification provisions of Megan's Law do not amount to punishment under the *Artway* test. *See Verniero*, 119 F.3d at 1105. In assessing the legislative purpose of Megan's Law, the first prong of *Artway*, the court referred to the Supreme Court's finding in *Artway* that the legislative purpose of the regis-

after *Ursery* the *Artway* synthesis was no longer appropriate for determining whether the notification provisions of Megan's Law constituted punishment.[178] Having the guidance from both *Artway* and *Ursery*, the Third

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tration provisions were not punitive, but rather were remedial. *See id.* at 1096-97. Accordingly, the court explained that the legislative intent of the notification provisions of Megan's Law also serve the remedial purpose of protecting against the danger of recidivism posed by sex offenders. *See id.* at 1097.

In addressing the second prong of *Artway*, the objective purpose of the provision, the court concluded "that the Tier 2 and 3 dissemination of information beyond law enforcement personnel is reasonably related to the nonpunitive goals of Megan's Law." *Id.* at 1098. In turning to the historical precedent of public notification, one of the factors a court should address under the second prong of *Artway*, the court noted that the appellants claimed that "the dissemination of information beyond law enforcement personnel is closely analogous to the well-recognized historical punishments of public shaming, humiliation and banishment as those practices were employed in colonial times." *Id.* at 1099. Nonetheless, the court held that "[d]issemination of such information in and of itself, however, has never been regarded as punishment when done in furtherance of a legitimate governmental interest." *Id.* at 1099-1100. Additionally, the court addressed whether the remedial purpose of the measure cannot fairly be said to justify all of its aspects. *See id.* at 1101. This is another question a reviewing court should ask under the second prong of *Artway*. *See id.* Under this analysis, the court restated "that the remedial purpose of Megan's Law justifies all of its aspects." *Id.*

Under the third and final prong of the *Artway* test, the effects of the measure, the court faced the issue of whether public shaming amounted to unconstitutional punishment. *See id.* at 1101-05. The court interpreted *Artway* to require that in order for the effects of a measure to render it "punishment," those effects must be extremely onerous. *See id.* at 1101. Accordingly, the court held that "[t]he direct effects of Megan's Law clearly do not rise to the level of extremely onerous burdens that sting so severely as to compel a conclusion of punishment." *Id.* The court explained that the indirect effects, such as loss of employment, injury to reputation and societal shunning, although harsh, are not punishment. *See id.* at 1102.

178. *Verniero*, 119 F.3d at 1094-95. The district court held that *Ursery* rejected the legal foundation of *Artway*. *See* W.P. v. Poritz, 931 F. Supp. 1199, 1208-09 (D.N.J. 1996), *rev'd sub nom.* E.B. v. Verniero, 119 F.3d 1077 (3d Cir. 1997). The district court explained that *Ursery* presented a new approach to addressing punishment that completely incapacitates the logical basis of the *Artway* test. *See id.* In *Poritz*, the United States District Court for the District of New Jersey refused to apply the *Artway* analysis in assessing the constitutionality of the notification provisions of Megan's Law. *See id.* The district court explained that *Ursery* "presented a different approach" to these issues. *Id.* The court held that *Ursery* rejects the "philosophical foundation of *Artway*: that a universal rule for the definition of 'punishment' can and should be derived through a 'synthesis' achieved from analyzing the Supreme Court's recent decisions." *Id.*

The appellees also argued that the *Artway* synthesis was undermined by the Supreme Court's recent decision in *Kansas v. Hendricks*, 117 S. Ct. 2072 (1997). *See Verniero*, 119 F.3d at 1094. In *Hendricks*, the Supreme Court upheld a Kansas statute that provides for the civil commitment of "sexually violent predators." *See Hendricks*, 117 S. Ct. at 2081; *see also* KAN. STAT. ANN. §§ 59-29a01 to -29a07 (1996) (providing that person convicted or charged with offense and suffering from "mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence," may be confined to state custody for "control, care and treatment until such time as the person's mental abnormality or personality disorder has so changed that the person is safe to be at large"). The court stated that "[i]n determining the continuing viability of *Artway*, therefore, [it

Circuit held that *Ursery* did not incapacitate the *Artway* synthesis.[179] Rather, the Third Circuit explained that, in its view, the *Artway* test is harmonious to the rationale in *Ursery*.[180] The court explained that if it "disregard[ed] the *Artway* standard, [it] would be required, once again, to 'divine' a 'test for punishment' by looking for common considerations in essentially the same set of Supreme Court precedents."[181] Accordingly, the Third Circuit explained that *Ursery* "confirms" that the *Artway* test is an appropriate standard and that it would not materially change the result of a case to devise a new test for assessing the punitive nature of a statute.[182]

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is necessary to give] careful consideration to how *Hendricks* addressed the question of whether civil commitment is punishment." *Verniero*, 119 F.3d at 1095. The Third Circuit found that there was "substantial overlap between the factors relied on in *Hendricks* and those that comprise the *Artway* test" and, thus, the court "discern[ed] no need to abandon (or overhaul) *Artway*." *Id.* The Third Circuit explained that "[l]ike *Ursery*, *Hendricks* does not establish a single formula for identifying which legislative measures constitute punishment and which do not." *Id.* Like the court in *Artway*, *Hendricks* made an inquiry into the legislative intent of the statute. *See id.* The court in *Verniero* also noted that *Hendricks* goes beyond the legislature's stated intent to consider additional factors that *Artway* incorporates into its objective purpose prong. *See id.* ("Like *Artway*'s inquiry into proportionality, *Hendricks* repeatedly describes how the Kansas statute is tailored to achieve its remedial purpose of protecting the public."). *Hendricks*, like *Artway*, relied heavily on history. *See id.* (noting that Supreme Court analogized civil confinement in Kansas statute to quarantines of those with highly contagious diseases, and noted that it has "never held that the Constitution prevents a State from civilly detaining those for whom no treatment is available, but who nevertheless pose a danger to others"). The Third Circuit further noted that *Hendricks* emphasized assessing the true salutary nature of a measure. *See id.* (noting that *Hendricks* Court looked to "multiple purposes of the Kansas statute, including incapacitation of dangerous sex offenders as well as their treatment" and concluded that statute did not constitute punishment). Finally, the court explained that even though the Court in *Hendricks* "does not explicitly discuss" the effects of the measure, the court found nothing in "*Hendricks* inconsistent with *Artway*'s direction to examine what the challenged measure actually does to the affected individuals." *Id.* at 1095-96.

179. *See Verniero*, 119 F.3d at 1094 ("*Ursery* provides no justification for abandoning [the *Artway*] standard.").

180. *See id.* ("Appellees insist that after *Ursery* and *Hendricks*, *Artway* does not provide an appropriate standard for determining whether Megan's Law notification constitutes 'punishment' for purposes of the Ex Post Facto and Double Jeopardy Clauses. We disagree.").

181. *Id.* at 1094 n.14. The court explained that the "holding of *Ursery* is a narrow one limited to civil forfeitures. Neither of the principal rationales supporting its conclusion is pertinent here and we find nothing in the Court's reasoning that is inconsistent with the *Artway* standard. It necessarily follows that *Ursery* provides no justification for abandoning that standard." *Id.* at 1094.

182. *See id.* ("*Ursery* confirms . . . (1) measures motivated by retributive animus are punishment, (2) even when the legislative action is not so motivated, an adverse consequence resulting from an *in personam* proceeding may be punishment if it is disproportionate to the remedial goal which the measure purports to pursue, and (3) measures that have traditionally been regarded as nonpunitive are not punishment in the absence of a retributive motive.").

It is clear that in the Third Circuit, *Ursery* does not overrule the *Artway* synthesis.[183] The question that persists after *Taylor* is to what extent does the analysis in each case coexist. The analysis in *Taylor* does not resolve whether the *Ursery* test applies beyond a double jeopardy challenge to civil *in rem* forfeiture.[184] The Third Circuit stated that *Ursery* is "arguably" distinguishable in cases addressing *in personam* civil sanctions.[185] Arguably, *Ursery*, on the one hand, could apply strictly to double jeopardy challenges to civil *in rem* forfeiture, and *Artway*, on the other hand, should control in cases that challenge other *in personam* actions, such as registration and notification provisions of sexual registration and notification laws.[186] Nonetheless, in *Taylor*, the Third Circuit applied the *Artway* test and incorporated relevant guidance from *Ursery* in assessing the effects prong

183. *See id.*

184. Taylor v. Cisneros, 102 F.3d 1334, 1343 (3d Cir. 1996) ("[W]e do not decide whether the forfeiture involved here is governed by *Ursery* for double jeopardy purposes.").

185. *See id.* *In personam* actions invoke greater constitutional protection. *See* United States v. Ursery, 116 S. Ct. 2135, 2147 (1996) (addressing legislature's intent in enacting forfeiture and pointing out that "forfeiture proceedings . . . are in rem . . . . 'In contrast to the in personam nature of criminal actions, actions in rem have traditionally been viewed as civil proceedings, with jurisdiction dependent upon seizure of a physical object.'" (quoting United States v. One Assortment of 89 Firearms, 465 U.S. 354, 363 (1984))). Some courts have limited the application of *Ursery* to civil *in rem* actions. *See* United States v. Reyes, 87 F.3d 676, 682 n.8 (5th Cir. 1996) ("*Ursery* . . . gives heavy emphasis to the *in rem* nature of the forfeitures there at issue, and distinguishes *Halper* and *Kurth Ranch* largely because those cases involved *in personam* proceedings."); Deutschendorf v. People, 920 P.2d 53, 59 (Colo. 1996) (applying *Halper* proportionality test in addressing constitutionality of *in personam* license suspension because *Ursery* "is clearly limited to the civil forfeiture context" and *Halper* focuses on *in personam* civil penalties); State v. Gustafuson, 668 N.E.2d 435, 442-43 n.2 (Ohio 1996) (explaining that *Ursery* is not applicable in cases addressing license suspension because it is not *in rem* action). Still, other courts have implicated *Ursery* when addressing challenges to *in personam* actions. *See* United States v. Imngren, 98 F.3d 811, 815 (4th Cir. 1996) (finding two-part analysis in *Ursery* useful in addressing punitive nature of statute allowing for *in personam* suspension of motorist's license and determining that *Halper*, *Austin* or *Kurth Ranch* were not helpful in analysis); United States v. Borjesson, 92 F.3d 954, 956 (9th Cir. 1996) (holding that, under *Ursery*, *in personam* debarment proceedings were not punitive), *cert. denied*, 117 S. Ct. 622 (1996). For a discussion of the important distinction between *in rem* and *in personam* proceedings in this area of law, see *supra* note 163 and accompanying text.

186. *See Taylor*, 102 F.3d at 1343 (noting potential limited reach of *Ursery*); *see also Ursery*, 116 S. Ct. at 2141 (drawing sharp distinction between *in rem* and *in personam* civil penalties in concluding that civil *in rem* forfeiture is not punishment for double jeopardy purposes); Various Items of Personal Property v. United States, 282 U.S. 577, 581 (1931) (stating that, in *in rem* proceedings, it is "the property which is proceeded against, and . . . held guilty and condemned as though it were conscious instead of inanimate and insentient" and "[i]n a criminal prosecution it is the wrongdoer in person who is proceeded against, convicted and punished. The forfeiture is no part of the punishment for the criminal offense").

of the test and Taylor's *in personam* eviction.[187] Accordingly, *Taylor* exemplifies the application of both standards and illustrates that both standards should coexist until the Supreme Court defines the analysis further.[188]

IV. CONCLUSION

The issue of whether parallel civil and criminal proceedings violate the Constitution is ever prevalent and complex in the present-day legal arena.[189] Forfeiture persists as a method for ensuring that criminals compensate the government.[190] *In personam* license suspensions remain a popular tool among the states to fight drunk driving.[191] Taxes, debarment proceedings and numerous other civil penalties are also prevalent civil sanctions.[192] All of these measures are subject to the constitutional prohibitions against punishment.[193] As the number and types of civil sanctions increase, the issue of the constitutionality of such measures becomes more complex.[194] The law in the area of unconstitutional punish-

187. *Taylor*, 102 F.3d at 1341 ("*Artway, Various Computers*, and *Ursery* . . . inform our result."). For a discussion of how the Third Circuit used *Ursery* in applying the *Artway* test, see *supra* notes 158-67 and accompanying text.

188. *See Taylor*, 102 F.3d at 1343.

189. *See* Mack, *supra* note 9, at 218 (noting that double jeopardy law is confusing, contradictory and fraught with exceptions).

190. *See* LEVY, *supra* note 10, at 88 (discussing increased use of forfeiture to combat rise in crime and drug use); Cole, *supra* note 9, at 251 ("[The] forfeiture remedy continues to spread.").

191. *See, e.g.*, Deutschendorf v. People, 920 P.2d 53, 59-60 (Colo. 1996) (invoking *Halper* as controlling precedent in challenge to *in personam* license suspension and distinguishing *Ursery* because it only addressed civil *in rem* forfeiture statute); State v. Gustafson, 668 N.E.2d 435, 442 n.2 (Ohio 1996) ("*Ursery* does not control disposition of the cases before us, which do not involve in rem civil forfeitures, but rather administrative suspensions of drivers' licenses."). In *Gustafson*, the court noted that it was not clear whether the Supreme Court would "confine application of *Ursery* solely to civil in rem forfeiture proceedings, or . . . [would] apply it more broadly, thereby minimizing the importance of *Halper* and its progeny as precedent." *Id.* As a result, the court saw it fitting to apply *Halper* and its progeny to the license suspension. *See id.* at 443.

192. *See, e.g.*, Manocchio v. Kusserow, 961 F.2d 1539, 1542 (11th Cir. 1992) (addressing double jeopardy challenge to administrative order excluding physician from participating in Medicare program for at least five years following doctor's conviction and sentencing on criminal charges of Medicare fraud); United States v. Reed, 937 F.2d 575, 577 (11th Cir. 1991) (addressing double jeopardy challenge to disciplinary proceeding after criminal charge of misappropriation of postal funds that followed disciplinary suspension).

193. *See* Department of Revenue v. Kurth Ranch, 511 U.S. 767, 777 (1994) (noting that all types of civil sanctions are subject to constitutional scrutiny). For a discussion of these constitutional protections, see *supra* notes 4-8 and accompanying text.

194. *See* Mack, *supra* note 9, at 218 (noting that Supreme Court justices have created "entirely new areas of double jeopardy interpretation with respect to parallel civil and criminal proceedings"); *see also* United States v. Stoller, 78 F.3d 710, 713 (1st Cir. 1996) (addressing whether administrative sanction imposed by Federal Deposit Insurance Corporation is punishment for double jeopardy purposes

ment and civil sanctions is ambiguous and unsettled.[195] The analysis in both *Artway* and *Taylor* reflect the complex legal analysis in assessing the constitutionality of the emerging civil sanctions in the present-day legal arena. There are no bright-line rules and settled applications of the Supreme Court jurisprudence in this area.[196] Nevertheless, in the Third Circuit, the *Artway* test persists as a guide to assessing the constitutionality of civil sanctions of varying types.[197]

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and exploring "shadowy corner[s] of the Double Jeopardy Clause, dimly lit by a trilogy of recent Supreme Court cases"), *cert. dismissed*, 117 S. Ct. 378 (1996).

195. *See* Mack, *supra* note 9, at 218 (noting double jeopardy law is so confusing that "no sensible meaning or policy has evolved").

196. *See* Opinion of the Justices to the Senate, 668 N.E.2d 738, 749 (Mass. 1996) (noting that when assessing constitutional protections against punishment, distinction between double jeopardy, due process and ex post facto protections "is not self-defining, so that a system of doctrine distinguishing one from the other has grown up").

197. *See* E.B. v. Verniero, 119 F.3d 1077, 1096-1105 (3d Cir. 1997) (applying *Artway* test to notification provisions of Megan's Law); Taylor v. Cisneros, 102 F.3d 1334, 1343 (3d Cir. 1996) (applying *Artway* test to *in personam* state eviction proceeding).